Supreme Court, U.S.
FILED
NOV 8 2002
OFFICE OF THE CLERK

No. 02-738

In The

Supreme Court of the United States

CUSTOM SHIP INTERIORS;
FREMONT COMPENSATION INSURANCE GROUP,

Petitioners,

v.

MICHAEL ROBERTS;
BENEFITS REVIEW BOARD;
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR;

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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85 pp

QUESTIONS PRESENTED

Whether the Fourth Circuit erred in concluding that the *per diem* funds paid to MICHAERL ROBERTS as reimbursement for room and board expenses should be included as "wages" under the Longshore Act for the purposes of computing his average weekly wage.

CORPORATE DISCLOSURE

Petitioner Fremont Compensation Insurance Group is engaged in the business of providing workers' compensation insurance to various businesses. This Petitioner is a division of Fremont General Corporation, its parent company, which is a publicly held corporation.

Petitioner, Custom Ship Interiors, is engaged in the business of restoring and renovating the interiors of ocean vessels. This Petitioner is privately owned; has no parent company; and no publicly held company has a 10% or greater interest in its equity.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Fourth Circuit opinion is reported at 300 F. 3d 510 (4th Cir. 2002), was decided on August 15, 2002, and is set forth in the Appendix at App. 1. The Benefits Review Board's Order reversing the Administrative Law Judge in Case No. 00-832, was filed on May 15, 2001, and is set forth in the Appendix at App. 13. The Administrative Law Judge's Opinion in Case No. 1999-LHC-3047 was filed on April 21, 2000, and is set forth in the Appendix at App. 23.

STATEMENT OF JURISDICTION

The Decision of the United States Court of Appeals for the Fourth Circuit, sought to be reviewed, was decided on August 15, 2002. There has been no order respecting rehearing, and no order granting an extension of time to file a petition for writ of certiorari. There has been no cross-petition for writ of certiorari filed. Jurisdiction to review the decision in question, by writ of certiorari, is conferred on this Court by 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

33 U.S.C. § 902(13) provides:

> The term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring enforced at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for any purposes of any withholding of tax under

subtitle C of the Internal Revenue Code of 1954 [26 U.S.C.A. §3101 et seq.](relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for work contributions to a retirement, pension, health and welfare, life insurance, training, social security, or other employee or dependent benefit plan for employees or dependent's benefit, or any other employee's dependent entitlement.

STATEMENT OF THE CASE

Statement of the Facts

A. Michael Allen Roberts

Mr. Roberts was injured while working for Custom Ship Interiors in Newport News, Virginia, on August 28, 1998. (JA 48, 230)[1]. The incident occurred while Mr. Roberts was working on a cruise ship inside a cabin, when a bunk fell onto his head and shoulders. (JA 53-54). After seeing a doctor in Virginia, Mr. Roberts told one of his supervisors that he could no longer work for Custom Ship Interiors; he subsequently flew to Miami; then drove to his home in Hernando, Florida (JA 56-57, 92-93). While he was in Newport News, Virginia, he was living on a Carnival Cruise Line ship, the *M/V Ecstasy*. (JA 58). While he was on the *M/V Ecstasy*, he lived in a room that was provided to him by the *Ecstasy* crew. (JA 59, 108). (emphasis added). The *Ecstasy* provided him with meals as well. (JA 59). (emphasis added).

Although he would still receive his *per diem* if the vessel was providing his room and board, there were times

[1] Citations to "JA" refer to the Joint Appendix filed by the parties on Appeal to the Fourth Circuit Court of Appeals.

when he would use his *per diem* for room and board expenses when those benefits were not provided by the vessel. (JA 107-108).

He did not work for Custom Ship Interiors in April, May, and June of 1998 because he was laid off. (JA 49). His work at Custom Ship was seasonal, and he personally made the choice to lay himself off for about one-third of the year when he was not working for Custom Ship. (JA 87).

He also lived in Virginia Beach for approximately two years prior to the incident. While he was working in Virginia Beach, his expenses were $400.00 per week for the hotel, and $150.00 per week for food. (JA 59-61). Mr. Roberts believed he was working on the *New Yorker* at that time. (JA 107).

Mr. Roberts has not filed any federal income tax returns since 1995 or 1996. (JA 108-109). When he did file, he was not behind as far as owing the government. (JA 109-110). Mr. Roberts asserts that he does not owe the government money; and although he is behind as far as filing tax returns right now, he is certain that he does not owe the government money. (JA 110).

Mr. Roberts never reported the *per diem* as income. (JA 109).

B. Jean Thomas

Ms. Jean Thomas, an accountant with Custom Ship Interiors, testified with regard to the Claimant's earnings history. After Mr. Roberts' year-to-date payroll register was admitted into evidence as Exhibit 34, (JA 212), Ms. Thomas educated the parties with regard to the various entries in the register. Using the Claimant's earnings from the week ending August 27, 1997 as an example, she noted that the pay stub reflected Mr. Roberts' regular 40 hours; his overtime of 20 hours; and a non-taxable amount of $542.50 reflecting his *per diem* at $77.50 per day. (JA 167-169, 214). Factoring in a 60-hour work week, there would be 7 days *per*

diem paid, which is 7 times the $77.50; one more day is paid than an individual actually works for *per diem*. (JA 168-169).

The *per diem* is not taxable and does not show on an employee's W-2 Form. (JA 168). (emphasis added). The *per diem* is a payment for eating expenses and the type of expenses one incurs while away from home and on the job. (JA 168). When the employees of Custom Ship are on a Carnival ship, they are considered Carnival's employees, and Carnival Cruise Line provides the room and board to the employee. (JA 168-169). (Emphasis added). The Claimant's pay stub for the week ending December 24, 1997 was the last pay stub he had for that year. The reason may have been that he did not work the week of Christmas; and, therefore, no hours would have been logged. (JA 169-170). Mr. Roberts did not work from the pay period ending March 18, 1998 until the pay period ending July 29, 1998. (JA 175). Custom Ship's work is intermittent in nature, as they are at the mercy of cruise ships. (JA 175). If there are no more ships to work on, the employees go home, and would not be called until the next job comes up. (JA 174-176).

According to the records, the Claimant worked 40 hours for the week ending September 9, 1998; 60 hours for the week ending September 2, 1998; and 60 hours for the week ending August 26, 1998. (JA 176-178). The gross amounts on the register include the *per diem* amount; the gross amounts on the W-2 Form do not reflect the *per diem* amounts. (Emphasis added). (JA 178-179). The *per diem* amounts were supposed to be used for an advance on living expenses, even though Carnival provided room and board. (JA 180-182). (Emphasis added).

Mr. Roberts testified that he had been working on the Carnival ships for one year prior to his injury on August 21, 1998, and that Carnival had provided him with room and board during that time. (JA 188).

Proceedings Below

On March 15, 1999, the Claimant filed a Claim for Compensation under the Longshore Act based on an injury of August 21, 1998. (JA 5). The claim proceeded to Formal Hearing before Administrative Law Judge (hereinafter "ALJ"), Linda Chapman, on January 12, 2000, and Judge Chapman's Decision and Order concerning the issues presented at the hearing was issued on April 28, 2000. Judge Chapman's Order set the Claimant's average weekly wage at $377.13, and declined to include the *per diem* payments Mr. Roberts' received from Custom Ship as part of the average weekly wage calculation. App. 23. Judge Chapman's Order was then appealed by the Claimant to the Benefits Review Board (hereinafter "The Board"), concerning Judge Chapman's calculation of the average weekly wage. The Board's Decision and Order issued May 15, 2001, reversed Judge Chapman's opinion concerning the inclusion of the *per diem* benefits in the average weekly wage calculation, and set Mr. Roberts' average weekly wage at $690.11. App. 13; (JA 229-237). That Decision and Order was appealed to the United Stated Court of Appeals for the Fourth Circuit, which affirmed the Benefits Review Board's Decision and Order on August 15, 2002. App. 1. From this disposition, the instant Petition for Writ of Certiorari has been filed.

Basis for Federal Jurisdiction in the Court of First Instance

The Administrative Law Judge had jurisdiction over the claim filed by Michael Roberts pursuant to 33 U.S.C. §901 et. seq., as the claim arose under the Longshore and Harbor Workers' Compensation Act.

REASONS FOR GRANTING THE PETITION

I. The Decision of the Fourth Circuit Court of Appeals Conflicts With The Decisions of Other Circuits

Although the *per diem* payments made to Michael Roberts were intended to be reimbursements for room and board expenses, and were not declared as income for tax purposes, the Fourth Circuit, nonetheless, held that the *per diem* payments were calculable within his average weekly wage pursuant to §2(13) of the Longshore Act. The Fourth Circuit based its holding on the premise that the *per diem* was actually compensation for services rendered because Mr. Roberts was able to secure free room and board and, therefore, had no expenses to reimburse. 300 F.3d at 514-15. In holding that the *per diem* reimbursements were actually compensation for services rendered, the Fourth Circuit essentially bypassed the second clause of §2(13), requiring "any advantage" received from the employer to also be included for the purposes of withholding tax in order to be considered a wage. See 33 U.S.C. §902(13) (2001).

The Fourth Circuit Decision squarely conflicts with the Ninth Circuit's Decision in McNutt v. Benefits Review Board, 140 F.3d 1247 (9th Cir. 1998). In McNutt, the Claimant received a *per diem* of $100 per day, a sum from which he could pay for his own food and lodging. The Court specifically noted that "if he could hold these expenses to $100 per day, he could keep the difference." McNutt, 140 F.3d at 1248. The McNutt decision and rationale is diametrically opposed to that of Roberts, as the Ninth Circuit reasoned that Mr. McNutt's *per diem* payments were not compensation for services rendered, but rather an "advantage" which must be subject to tax withholding in order to be considered in the claimant's average weekly wage pursuant to §2(13) of the Act. Id. (emphasis added).

Interestingly, the parties in McNutt agreed that the *per diem* payments were not subject to withholding under the Internal Revenue Code, and likewise there has been no claim herein that Mr. Roberts *per diem* payments were taxable. Therefore, the McNutt Court held that since the $100 *per diem* payments were not subject to tax withholding, they could not be included in Mr. McNutt's average weekly wage calculation.

The dichotomy between the Fourth and Ninth Circuit's rationale in one respect stems from the struggle over how to treat residual *per diem* funds. For example, the Fourth Circuit used the fact that Mr. Roberts secured free room and board while at the same time collecting the *per diem* as a means to decide that the *per diem* payments were compensation for services rendered, rather than non-taxable advantages. On the other hand, the Ninth Circuit specifically noted that Mr. McNutt could "keep the difference" if he could hold his expenses to under $100 per day. However, this fact did not convince that Court to metamorphasize the *per diem* payments into compensation for services rendered. Therefore, the Ninth Circuit declined to penalize the Employer/Carrier for an employee's ability to hold his expenses under the *per diem* rate, as the Fourth Circuit did in Roberts.

Although not exactly analogous, another decision in the Ninth Circuit, as well as a recent decision of the Fifth Circuit, have determined that the value of meals and lodging directly received from an employer were not calculable in a claimant's average weekly wage under the Longshore Act. In Wausau Insurance Company v. Director, OWCP, 114 F.3d 120 (9th Cir. 1997), the Ninth Circuit held that the value of meals and lodging provided by an employer is not compensation for services rendered, but rather non-monetary compensation or advantages which must be subject to tax withholding in order to be included in a claimant's average weekly wage. Wausau Insurance Company v. Director, OWCP, 114 F.3d 120 (9th Cir. 1997).

Similarly, in H. B. Zachary Co. v. Quinones, 206 F.3d 474 (5th Cir. 2000), the Fifth Circuit, likewise, held that the value of claimant Jose Quinones' meals and lodging was not the money rate by which he was compensated for a service rendered, but instead was a non-monetary advantage which could be included in his average weekly wage if it was subject to withholding tax. H. B. Zachary Co. v. Quinones, 206 F.3d 474 (5th Cir. 2000). The Quinones Court ultimately concluded that since Mr. Quinones' room and board value was not subject to tax withholding, the value of those benefits could not be part of his average weekly wage. Id. at 478. Interestingly, the Director, OWCP joined the Employer/Carrier in arguing that the value of meals and lodging should not be included in wages under the Longshore Act. Id. at 477.

II. The Decision of the Fourth Circuit is Incorrect

On its face, the Fourth Circuit's Opinion alleges that the *per diem* payments were compensation for services rendered, rather than "advantages" which must be subject to tax withholding. 300 F.3d at 514-15 However, as the dissent therein points out, the Fourth Circuit itself has defined "wages" as " 'the money rate of compensation as provided: (1) for the employee's services, (2) by an employer, (3) under the employment contract enforced at the time of the injury'". 300 F.3d at 515-517. However, in applying this definition, the incongruity between the majority opinion below and the facts of the case is plainly evident. Indeed, the un-controverted evidence is that Mr. Roberts' *per diem* payments were not compensation for services rendered. (JA 168). Herein, Mr. Roberts was paid an hourly rate based on the number of hours he worked, and this alone constituted his compensation for services rendered (JA 167-169, 214). On the other hand, it is well settled through the uncontested facts herein that the *per diem* payment was not intended to be a "money rate" for

"services rendered", yet was to be used as a reimbursement for food and/or housing expenses (JA 167-169). Thus, the majority opinion's construction of the *per diem* reimbursements as compensation for services rendered is unfounded, even considering the fact that he was (fortunately) able to secure *gratis* room and board and keep the difference.

III. The Question Presented Is Important

In addition to the legal conflicts and issues addressed above, there are also important public policy questions which were created by the Fourth Circuit's conflicting decision. In the Fourth Circuit, it is now possible for longshoremen, who are being compensated the exact same hourly rate for services rendered and working the exact same hours, to have different average weekly wages depending on how they spend their *per diem* payments and secure food and lodging. For example, a Longshoreman who is able to secure economical (or free) housing and likewise budget his meal expenses frugally will have a different average weekly wage than a longshoreman who secures more expensive housing and spends the remainder of his *per diem* more lavishly on food and expenses, even though these two hypothetical Longshoreman worked the same exact number of hours at the same exact hourly rate.

Consideration must also be given to the fact that longshoremen in the Fourth Circuit will have their average weekly wages computed differently than those in the Ninth Circuit, and perhaps different than those in the Fifth Circuit as well, based on the Quinones decision. There is also the complicating factor that no taxes are traditionally taken from *per diem* payments in any Circuit, and the Fourth Circuit ruling may require longshoremen and employers in the Fourth Circuit to keep copious track of *per diem* expenses in order to determine exactly: (1) which expenses are spent on room and board, (2) which ones are not, and (3) which

expenses may or may not be taxable as compensation for services rendered. The remainder of the longshoremen and employers outside of the Fourth Circuit will not have to complete this daunting task, however.

Simply put, because *per diem* payments are not compensation for services rendered, a longshoreman and his employer should not be rewarded or penalized with regard to how a claimant secures his room and board, either economically or lavishly. To do so would create different classes of individuals in different Circuits based on how they budget their expenses, and stray from the uniformity toward which the Longshore Act strives. Therefore, in addition to the rationale discussed in Sections 1 and 2, this is an important issue which must be resolved by the High Court.

CONCLUSION

For all the foregoing reasons, the Petitioner requests this Honorable Court to grant this Petition for Writ of Certiorari and reverse the Decision of the Fourth Circuit Court of Appeals.

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CUSTOM SHIP INTERIORS; FREMONT COMPENSATION INSURANCE GROUP,
Petitioners,

v.

No. 01-1880

MICHAEL ROBERTS; BENEFITS REVIEW BOARD; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for Review of an Order
of the Benefits Review Board
(BRB No. 00-832)

Argued: June 3, 2002

Decided: August 15, 2002

Filed: August 15, 2002

Before WILKINSON, Chief Judge, and NIEMEYER and WILLIAMS, Circuit Judges

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Affirmed by published opinion. Chief Judge Wilkinson wrote the majority opinion, in which Judge Williams joined. Judge Niemeyer wrote a dissenting opinion.

COUNSEL

ARGUED: Frank Joseph Sioli, Jr., VALLE & CRAIG, P.A., Miami, Florida, for Petitioners. Ralph R. Lorberbaum, ZIPPERER & LORBERBAUM, P.C., Savannah, Georgia, for Respondent Roberts. Mark S. Flynn, Senior Appellate Attorney, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Respondents Board and Director. **ON BRIEF:** Lawrance B. Craig, III, VALLE & CRAIG, P.A., Miami, Florida, for Petitioners. Howard M. Radzely, Acting Associate Solicitor, Allen H. Feldman, Associate Solicitor for Special Appellate and Supreme Court Litigation, Nathaniel I. Spiller, Deputy Associate Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Respondents Board and Director.

OPINION

WILKINSON, Chief Judge:

Petitioner Custom Ship Interiors appeals the decision of the Benefits Review Board ("BRB") that regular per diem payments made to employees incurring no room and board expenses should be included as wages under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "Act"), 33 U.S.C. §§ 901 *et seq.* (2002). Custom Ship contends that the payments were "advantages" not subject to tax withholding, and thus not properly viewed as "wages" under the Act. Because the per diem payments were disbursed to the employee each week despite the fact that Custom Ship knew that he was incurring no food or lodging expenses needing reimbursement, we affirm the judgment of the BRB that the payments were includable as "wages" under the Act.

I.

Michael Roberts injured his back while remodeling a Carnival Cruise ship for his employer, Custom Ship Interiors. Roberts had worked for Custom Ship for approximately nine years. His work was seasonal, covering roughly two-thirds of the year. During his periods of employment, he normally worked six days a week for a total of about sixty hours.

In addition to his weekly salary and any overtime pay, Roberts' employment contract entitled him to per diem payments of approximately $77.50 per day. According to Custom Ship, the per diem was non-taxable and was intended to cover employees' meal and lodging expenses while they were on jobs away from home. However, Custom Ship provided these cash payments without any restrictions, meaning the recipients could spend them in any way they saw fit. For approximately one year prior to his injury, Roberts was assigned to Carnival and incurred no room and board expenses because Carnival provided free room and board to its remodelers. Custom Ship knew that Carnival provided these amenities. Still, Custom Ship continued to provide the unrestricted cash payments to employees working on Carnival ships despite knowing that none of the employees incurred any expenses.

On August 21, 1998, while working aboard a Carnival Cruise ship docked in Norfolk, Virginia, Roberts was struck by a steel bunk bed falling from the wall. Immediately after the accident, Roberts was sent to lie down in an adjacent cabin and his supervisors were notified. A day or two later, after experiencing intense back, neck, head, and right leg pain, he went to see a physician on the ship. He remained on the ship for some time, hoping his condition would improve and attempting to do some light work. However, he was unable to work and eventually left the ship for Florida in order to seek medical attention. Since

the injury, Roberts has experienced constant back pain and has not performed any further work for Custom Ship.

On March 15, 1999, Roberts filed a claim for disability benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, in Florida where he was living at the time. His claim went before an Administrative Law Judge who determined that Roberts was temporarily disabled as a result of a work-related injury, a finding not disputed on appeal. Roberts was thus entitled to benefits, the amount of which are based on a claimant's average weekly wage as defined and calculated under the Act. Roberts claimed that in addition to his normal weekly wage and overtime, the $77.50 per diem should be included in his average weekly wage calculation. However, the ALJ ruled that tax-exempt per diems for the purpose of defraying expenses for meals and lodging do not fall within the definition of wages set forth in the Act. The ALJ concluded that Roberts' average weekly wage was $377.13.

The Benefits Review Board reversed. Because the injury occurred in Virginia, the law of this circuit was controlling. *See* 33 U.S.C. § 921(c). And under *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311 (4th Cir. 1998), the Board held Roberts' per diem payments should be included in the calculation of average weekly wages. The BRB based its conclusion primarily on the fact that Roberts received the per diem in his pay check every week, regardless of whether he incurred any expenses. Moreover, the BRB concluded that the per diem was part of Roberts' employment contract. Thus, the BRB determined that Roberts' average weekly wage was $690.11. Custom Ship now appeals.

II.

The Longshore and Harbor Workers' Compensation Act compensates covered workers for the loss of wage-earning capacity due to disabling job-related injuries. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121 (1997). At the heart of the Act's compensation scheme is the definition of "wages" contained in § 2(13). That section specifies what items will be used to determine the claimant's preinjury average weekly wage, which is then used to calculate benefits. *See Wright*, 155 F.3d at 317. It defines "wages" as:

> the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for the purposes of any withholding tax under subtitle C of the Internal Revenue Code of 1954 [26 U.S.C.A. § 3101 et seq.] (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for employee's or dependent's benefit, or any other employee's dependent entitlement.

33 U.S.C. § 902(13).

In *Wright*, we interpreted § 2(13) to define "wages" as "the `money rate' of compensation that is provided (1) for the employee's services (2) by an employer (3) under the

employment contract in force at the time of the injury." 155 F.3d at 325. All compensation that meets these requirements satisfies the Act's definition of wages, although § 2(13) contains two clauses under which a payment might fall.

The opening clause of § 2(13) broadly covers the money rate at which an employee is compensated under his employment contract for providing services. We concluded in *Wright* that, "[a]t a minimum, this encompasses cash compensation" provided for services rendered under the employment contract. *Id.* at 319. If the payment at issue is not regular cash compensation it might still fall under the second clause, which expressly includes as a "wage" the reasonable value of "any advantage" received by the employee that is subject to tax withholding. *Id.* at 319-20. It is important to note that the second clause does not serve to limit the first. *See id.* at 319 n.10. Instead, it defines a different category of benefits that might be considered wages. Although the second clause encompasses both monetary and in kind compensation so long as it is "readily identifiable and calculable," *id.* at 322-24, it primarily addresses nonmonetary benefits that cannot be viewed as the regular money rate of compensation. *See id.* at 319-21. Finally, the third clause expressly excludes other "fringe benefits," whose value to the employee is "too speculative to be readily converted into a cash equivalent." *Id.* at 320.

The Fifth Circuit subsequently interpreted our decision in *Wright* to mean that if a benefit is paid in dollars and cents and therefore has a value that is apparent on its face, it constitutes a wage rather than a fringe benefit under § 2(13). *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 432 (5th Cir. 2000). Thus, in *Gallagher*, the Fifth Circuit held that container royalty benefits paid annually to longshoremen are properly included as wages in the calculation of benefits under the Act. *Id.* at 433.

III.

Custom Ship contends that the contested payments were reimbursements for food and lodging rather than regular compensation, and thus that they may not count as "wages" unless they were subject to employment tax withholding. However, Custom Ship's argument flies in the face of its decision to regularly provide Roberts the payments despite knowing that he had no expenses to reimburse. Because the payments were virtually indistinguishable from Roberts' regular hourly wages, we must affirm the decision of the BRB.

We recognize, of course, that per diem payments are traditionally seen as reimbursements for expenses, including room and board when traveling, and are not generally considered regular taxable wages. *See* 26 U.S.C. § 119 (2002). However, when a per diem is given in the face of knowledge that the employee has no expenses, it is less clear that the per diem is a reimbursement rather than a regular wage.

The payments here had every indicia of an ordinary wage. Roberts regularly received them in his weekly pay check as a part of his employment contract. Like his hourly wages, the payments correlated to the amount of time Roberts worked each week. If Roberts worked one day, he would receive one per diem payment in his pay check. Moreover, the payments were unrestricted cash payments. There was no requirement that Roberts spend the payments on room and board. In fact, Roberts was not even required to incur any room and board expenses at all. Thus, Custom Ship's attempt to characterize the payments as room and board reimbursements, and thus nonmonetary "advantages," does not change the fact that they were obviously regular wages.

Whether a true per diem reimbursement payment should be includable as a "wage" under the Act is not the

relevant question here because these payments did not resemble reimbursements in any way. True per diem reimbursements generally bear at least some rough approximation to room and board expenses; however the payments here were not linked to actual expenses of any sort. Custom Ship knew that Carnival provided free food and lodging to ship remodelers. Thus, Custom Ship included the payments in Roberts' weekly pay checks despite knowing that he was not incurring any of the expenses the per diem was nominally to reimburse.

Custom Ship argues that the payments at issue must be subject to withholding to be viewed as a wage. However Custom Ship misconstrues the Act's definition of a "wage." Whether or not a payment is subject to withholding is not the exclusive test of a "wage." Monetary compensation paid pursuant to an employment contract is most often subject to tax withholding, but the LHWCA does not make tax withholding an absolute prerequisite of wage treatment. As the BRB correctly noted, "the *per diem* at issue here is part of the money claimant receives from employer, and is thus includable in average weekly wage under the first clause of Section 2(13) regardless of whether it is subject to tax withholding." Michael A. Roberts, BRB No. 00-832 (May 15, 2001). Because the payments are included as wages under the first clause of § 2(13), Custom Ship's invocation of the second clause of § 2(13) is unavailing. This second clause enlarges the definition of "wages" to include meals and lodging provided in kind by the employer, but only when the in kind compensation is subject to employment tax withholding. The second clause, however, does not purport to speak to the basic money rate of compensation for service rendered by an employee under which the cash payments in this case fall. *See Wright*, 155 F.3d at 319 & n.10.

Custom Ship further argues that we should follow the Fifth and Ninth Circuits' holdings that the value of meals and lodging furnished by an employer is not

includable as wages under the LHWCA. *H.B. Zachry Co. v. Quinones*, 206 F.3d 474 (5th Cir. 2000); *Wausau Ins. Cos. v. Dir., Office of Workers Comp. Programs*, 114 F.3d 120 (9th Cir. 1997). This case is quite different from *Quinones* and *Wausau*, however. The payment here was in the nature of monetary compensation. By contrast, *Quinones* and *Wausau* involved the value of meals and lodging provided to employees. As we have already noted, monetary compensation and in kind benefits are treated differently under the statute in that the latter to be includable must be subject to tax withholding. That is not true of Roberts' monetary payments, however. In fact, we note further that the BRB rejected Roberts' contention that the value of the free room and board provided by Carnival should also be viewed as wages, and Roberts does not appeal that decision. Instead, Roberts is claiming as wages only the actual money he regularly received in his weekly pay check.*

The so-called per diem in this case was nothing more than a disguised wage. Were it viewed otherwise, Roberts would not be adequately compensated for the loss of his wage-earning capacity at the time of his injury. That, of course, would undermine the entire premise of the Longshore and Harbor Workers' Compensation Act.

IV.

For the foregoing reasons, we affirm the judgment of the Benefits Review Board.

AFFIRMED

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* Custom Ship's reliance on *McNutt v. Benefits Review Board*, 140 F.3d 1247 (9th Cir. 1998), is similarly unavailing. In *McNutt*, unlike here, the claimant had incurred actual room and board expenses.

NIEMEYER, Circuit Judge, dissenting:

Michael Roberts was injured while working as an employee for Custom Ship Interiors, a ship remodeling firm. At the time of his injury, Roberts was working on the remodeling of a Carnival Cruise ship. He filed a claim for disability benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.*, and the Administrative Law Judge ("ALJ") determined that Roberts was entitled to benefits.

Disability benefits under the LHWCA are calculated using the claimant's average weekly wage as defined by the Act. *See* 33 U.S.C. § 902(13). In computing Roberts' average weekly wage, the ALJ took into account Roberts' normal weekly wages and overtime pay, but not the $77.50 per diem paid by his employer to defray the costs of Roberts' meals and lodging while Roberts worked away from home on the Carnival Cruise ship. The Benefits Review Board reversed, concluding that the per diem payments should be included as part of Roberts' average weekly wages because the per diem payments were paid every week, regardless of whether Roberts incurred the meals and lodging expense, noting that while working on the Carnival Cruise ship, Roberts did not incur expenses for meals and lodging because Carnival Cruise supplied meals and lodging to workers remodeling its ship, not as a matter of contractual obligation, but merely as an accommodation to the workers.

Because I agree with the ALJ's decision not to include the per diem in calculating Roberts' weekly wage, I would reverse the decision of the Benefits Review Board.

It is true that Custom Ship Interiors paid the per diem regardless of how much the employee actually incurred for meals and lodging or whether the employee incurred any expense at all. It was a fixed sum reimbursement paid to every employee who worked away from home and did not depend on an employee's

accounting for his actual expenses. And thus it is also true that to the extent that an employee did not incur actual expenses equal to the $77.50 per diem paid by Custom Ship Interiors, the per diem payment provided the employee with a monetary advantage. But this monetary advantage was not *compensation for services*. Rather, it was simply an advantage realizable by the employee who did not use the entire per diem expenses.

The proper decision in this case turns on whether this monetary advantage falls within the definition of wages. The controlling definition of wages is supplied by 33 U.S.C. § 902(13), which provides:

> The term "wages" means the money rate at which the *service* rendered by an employee is *compensated* by an employer under the contract of hiring in force at the time of the injury, *including* the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 [26 U.S.C. §§ 3101 *et seq.*].

(emphasis added). The text of this provision requires that a wage be compensation for "service," not a reimbursement for expenses, and we have so concluded. *See Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 319 (4th Cir. 1998) (defining "wages" as " the `money rate' of compensation that is provided (1) for the employee's services (2) by an employer (3) under the employment contract in force at the time of the injury"). Simply because a per diem is granted regardless of the amount of expenses actually incurred is not a basis by which to convert the per diem allowance into a compensation for service. Indeed, were the employee able to work while living at home, he

would not receive the per diem but would still have rendered the same services to his employer.

Moreover, the "including" clause – which defines as a wage "the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code" – does not make a reimbursement for expenses a component of average weekly wages for two reasons. First, the per diem is paid for expenses incurred on the road, whether actually incurred or not, and it is not a compensation for services. Second, the per diem is not included in any W-2 form reported to the IRS. As we explained in *Universal Maritime*, the "including" clause defines as a wage any form of nonmonetary compensation as long as that nonmonetary compensation could be included as wages "and must be subject to tax withholding." *Id.* at 323.

The majority suggests that if an employee does not incur the expenses up to the amount of per diem for meals and lodging, it somehow receives the balance as compensation for services. If this principle were correct, every employee who "saved" money on a fixed per diem would owe the United States taxes. But this is not the law, nor is it the practice. *See, e.g., H.B. Zachry Co. v. Quinones, Director*
OWCP, 206 F.3d 474, 479 (5th Cir. 2000); *McNutt v. Benefits Review Board*, 140 F.3d 1247, 1248 (9th Cir. 1998) (per curiam).

Because I conclude that the per diem expenses which were paid irrespective of actual expenses were not compensation for services and therefore should not have been included in Roberts' average weekly wage for calculation of disability benefits, I would reverse the decision of the Benefits Review Board. Accordingly, I respectfully dissent.

U. S. Department of Labor
Benefits Review Board
P. O. Box 37601
Washington, DC 20013-7601

BRB No. 00-832

MICHAEL A. ROBERTS	)
	)
Claimant-Petitioner	)
	)
v.	)
	)
CUSTOM SHIP INTERIORS	)
	)
DATE ISSUED: May 15, 2001	)
	)
and	)
	)
FREMONT COMPENSATION INSURANCE GROUP	)
	)
Employer/Carrier-Respondents	)

DECISION and ORDER

Filed May 15, 2001

Appeal of the Decision and Order of Linda S. Chapman, Administrative Law Judge, United Stated Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, forClaimant.

Lawrance B. Craig, III and Frank J. Sioli, Jr. (Valle & Craig, P.A.), Miami, Florida, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER,
Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-3047) of Administrative Law Judge Linda S. Chapman rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C.§901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C., §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U. S. 359 (1965).

Claimant was injured on August 21, 1998, while working on a cruise ship inside a cabin, when a steel bed fell on him. Claimant had performed seasonal work for employer, Custom Ship Interiors (CSI), working about two-thirds of the year, for about nine years, remodeling cruise ship interiors. In addition to his salary, claimant received a $77.50 *per diem*. Tr. At 161. Employer's accountant, Ms. Thomas, testified that the *per diem* was an advance payment to cover expenses of employees when they were away from home and on the job, and that employees, like claimant, who worked six days per week, received a *per diem* for seven days. Ms. Thomas stated that the *per diem* was not taxable and did not appear on the employees' W-2 forms. Tr. At 161-162. At the time of the injury, claimant was working in Newport News, Virginia, on the Carnival Cruise ship, the *M/V Ecstasy*, and was provided with room and board by Carnival at no cost to him, in addition to the *per diem*. Tr. At 52-54. Claimant testified that when he had worked previously in Virginia Beach for two years, his hotel cost

$400 per week, and meals $100 per week. Claimant testified that he used the *per diem* to cover room and board, but that sometimes the owners of the ships would pay for or provided room and board and he would still receive the *per diem*. Tr. At 101-102. Employer paid claimant temporary total disability benefits from August 22, 1998, through July 15, 1999, based on an average weekly wage of $665.68. Tr. At 7. Claimant did not return to work after his injury, but moved to Florida to live with his family, as they could assist with his care.

In her decision, the administrative law judge awarded claimant continuing temporary total disability benefits beginning August 12, 1998, based on an average weekly wage of $377.13, calculated under Section 10(c) of the Act, 33 U.S.C. §910(c). Relying on law from the United States Courts of Appeals for the Fifth and Ninth Circuits, she found that the *per diem* should not be included as "wages" for purposes of computing claimant's average weekly wage, because it is not a taxable advantage. Decision and Order at 20.

On appeal, claimant contends that the administrative law judge erred in excluding the *per diem* and the value of the room and board he received while working on the Carnival ship from her calculation of average weekly wage. Claimant contends that the decision of the United States Court of Appeals for the Fourth Circuit in *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998), is controlling on this issue, rather than the case law from the Fifth and Ninth Circuits on which the administrative law judge relied. Employer responds, asserting that these items were properly excluded from the average weekly wage calculation.

Section 2(13) of the 1984 Act defines "wages" as:

> the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

33 U.S.C. §902(13)(1994).[1] The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this

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[1] Section 2(13) as amended in 1984 codifies the holding of the United States Supreme Court in *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 15 BRBS 155(CRT)(1983). In *Morrison-Knudsen*, the Court, in construing Section 2(13) prior to the 1984 Amendments, stated that where benefits received are not "money recompensed," or "gratuities received from others, " the narrow question is whether the benefits are a "similar advantage" to board, rent, housing, or lodging in that the benefits have a present value that can be readily converted into a cash equivalent on the basis of their market value.

case arises, [2] has not specifically addressed the issue of whether room and board or a *per diem* constitutes wages under Section 2(13). In *Wright*, 155 F.3d 311, 33 BRBS 15(CRT), however the Fourth Circuit had occasion to interpret Section 2 (13) in a different context. In that case, the court held that holiday, vacation, and container royalty payments are not fringe benefits and are wages under Section 2(13) as "the 'money rate' of compensation that is to be provided (1) for the employee's service (2) by an employer (3) under the employment contract in force at the time of injury," *Wright*, 155 F.3d at 319, 33 BRBS at 209(CRT). The court elaborated that pursuant to Section 2(13), "wages" also include the reasonable value of "any advantage" which is received from employer and is included for purposes of tax withholding. *Id.* 155 F.3d at 318, 33 BRBS at 20(CRT). With regard to other types of payments, however, the Fourth Circuit declared that Section 2(13)'s definition of wages is ambiguous, and the court examined its history for guidance. *Id.* 155 F.3d at 318, 33 BRBS at 19(CRT). The court concluded that the structure of the first sentence of Section 2(13) demonstrates that the "advantages" described in the latter part of the sentence illustrate one class of the compensation defined generally in the first part of the sentence: "The work 'including' in §2(13) indicates that the reasonable value of advantages that are received from employers and trigger tax withholding will necessarily be 'part of the larger [category] of

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[2] Employer asserts that claimant cannot rely on *Wright*, because he filed his claim in District 6 (Jacksonville) and litigated the case in Tampa, which is within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. Under Section 21(c) of the Act, however, the law of the circuit in which the injury occurred is applicable. See 33 U.S.C. §921(c); *Dantes v. Western Foundation Corp.* 614 F.2d 299, 11 BRBS 753 (1st Cir. 1980). As claimant's injury occurred in Newport News, Virginia, the law of the Fourth Circuit is controlling in this case.

compensation for employees' services provided by employers under the prevailing employment contract." *Id.*, 155 F.3d at 319 n. 10, 33 BRBS at 20-21 n. 10(CRT). The *Wright* court elaborated: "the section expressly 'include[es]' as *an illustration* of such compensation the reasonable value of any advantage that is received from the employer and triggers tax withholding." *Id.*, 155 F.3d at 325, 33 BRBS at 26(CRT)(emphasis added).

The *Wright* court also noted that the Board's interpretation of this section in *Quinones v. H. B. Zachery, Inc.*; 32 BRBS 6 (1998), [3] was consistent with its own, while that of the United States Court of Appeals for the Ninth Circuit in *Wausau Ins. Cos. v. Director, OWCP*, 14 F.3d 120, 31 BRBS 41(CRT)(9th Cir. 1997), and *McNutt v. Benefits Review Board*, 140 R.3d 1247, 32 BRBS 71(CRT)(9th Cir. 1998), was to the contrary, *Wright* 155 F.3d at 318 n. 10, 33 BRBS at 20-21 n. 10. In *Quinones*, the Board held that both case law and general rules of statutory construction support the interpretation that, while an advantage subject to tax withholding is a "wage" pursuant to Section 2(13), the use of the term "including" does not mandate that a benefit not subject to tax withholding is not a wage *per se*. Rather, the Board explained, advantages subject to tax withholding are but one example of the benefits which may be included as wages. As the last sentence of Section 2(13) does not include room and board as fringe benefits which are excluded from the calculation of average weekly wage, the Board affirmed the administrative law judge's decision to include the value of the claimant's room and board in his average weekly wage calculation, *Quinones*, 32 BRBS at 10; see *n.3, supra.*

As discussed by the Fourth Circuit in *Wright*, the Ninth Circuit reached a different conclusion in interpreting this section. The Ninth Circuit read the term "including"

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[3] The Board's decision was subsequently reversed by the Fifth Circuit, *H. B. Zachery Co., v. Quinones*, 206 F.3d 474, 34 BRBS 23 (CRT) (5th Cir. 2000); see discussion, *infra.*

contained in Section 2(13) as "or", thereby interpreting the phrase "including the reasonable value of any advantage" as a mandatory limitation on the inclusion of non-monetary compensation to that subject to tax withholding in the definition of wages. *Wausau*, 114 F.3d at 122, 31 BRBS at 42(CRT). In *Wausau*, the court reversed the Board's holding that the value of an employer-provided room and board was includable in an employee's average weekly wage, and ruled that the Act defers to the Internal Revenue Service's criteria for deciding whether non-monetary compensation is wages. After determining that the value of meals and lodging was not income pursuant to Section 119 of the Internal Revenue Code, the court held that the value of the claimant's meals and lodging should not have been included as wages under the Act. *Id.* 114 F.3d at 122, 31 BRBS at 42(CRT). Pursuant to *Wausau*, the Ninth Circuit held that while a *per diem* a claimant received from an employer to pay for room and board was an "advantage," it was not a "wage" under the Act because it was not subject to withholding under the Internal Revenue Code. *McNutt*, 140 F.3d 1247, 32 BRBS 71(CRT). The Fifth Circuit subsequently reached the same conclusion, reversing the Board's interpretation of Section 2(13). See *H.B. Zachery v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).[4]

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[4] In reversing the Board's decision, the Fifth Circuit held that "Section 2(13) is clear on its face. It provides that 'wages' equals monetary compensation plus taxable advantages." *Quinons*, 206 F.3d at 479, 34 BRBS at 27(CRT). While the analysis of Section 2(13), and specifically the phrase "including the reasonable value of any advantage," differs in *Quinones* and *Wright*, the results are not inconsistent. *Quinones* involved the reasonable value of room and board provided by employer, which thus fell squarely within the second clause of Section 2(13), whereas *Wright*, like the present case and *Story v. Navy Exchange Service Center*, 30 BRBS 225 (1994), *aff'd on recon.*, 33 BRBS 111 (1999), discussed *infra*, involves case paid to claimant, and thus, monetary compensation under the first clause.

Following its analysis of Section 2(13), the Fourth Circuit in *Wright* held that vacation, holiday, and container royalty pay are "wages" within the first clause of Section 2(13), when they are earned as compensation for actual services rendered, pursuant to the contract of employment. *Wright*, 155 F.3d at 325-326, 33 BRBS at 26-27(CRT). Similarly, in *Story v. Navy Exchange Service Center*, 30 BRBS 225 (1994), *aff'd on recon.*, 33 BRBS 111 (1999), the Board affirmed the administrative law judge's finding that the tips the claimant received were wages under the first clause of Section 2(13), as they were part of the money rate at which claimant was compensated by employer. In *Story*, the Board rejected the Ninth Circuit's approach in *Wausau*, and found "compelling" the reasoning of the Fourth Circuit in *Wright*. The Board reaffirmed the approach it took in *Quinones*, that the term "including" which prefaces the second clause of the first sentence of Section 2(13), is exemplary and not exclusive.[5] *Story*, 33 BRBS at 116.

In the instant case, the administrative law judge summarily found applicable the reasoning of the Ninth and Fifth Circuits. She did not discuss the Fourth Circuit's decision in *Wright*, and whether or not it would demand a different result. As in *Wright* and *Story*, the *per diem* at issue here is part of the money claimant receives from employer, and is thus includable in average weekly wage under the first clause of Section 2(13) regardless of whether it is subject to tax withholding.[6] It is apparent from claimant's computerized pay stubs that claimant received the *per diem* in his pay check from employer every week. EX 34. Moreover, it is apparent from these records, as well as the

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[5] The decisions in *Story* were issued prior to the Fifth Circuit's decision in *Quinones*.

[6] In *Story*, the Board noted that tips are subject to tax withholding, although such was not required for them to be considered a wage. *Story*, 33 BRBS at 116 n. 7.

testimony of employee's accountant, Ms. Thomas, that the *per diem* was part of the agreement, *i.e.*, "contract," under which claimant was hired. See Tr. At 156 *et seq.* Thus, in view of *Wright* and *Story*, we reverse the administrative law judge's exclusion of the *per diem* from claimant's average weekly wage. The *per diem* payments claimant received in the year prior to his injury, claimant received $16,275 as *per diem*. Dividing this sum by 52 equals $312.98. Adding this to the average weekly wage of $377.13 calculated by the administrative law judge equals $690.11. We therefore modify the administrative law judge's decision to reflect claimant's average weekly wage as $690.11.

We reject, however, claimant's assertion that the value of the free room and board which Carnival Cruise Lines provided him should be included in his average weekly wage, in addition to the *per diem* paid by his employer. Underlying the Act are policies of promoting full employee recovery, while at the same time avoiding double recoveries. See generally *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). As the Act attempts "to provide a single complete recovery to the employee, " *Id.*, 782 F.2d. at 518, 18 BRBS at 51(CRT), claimant cannot have both the *per diem* and the value of the room and board included in his average weekly wage calculation.

Accordingly, the administrative law judge's exclusion of the *per diem* from claimant's average weekly wage is reversed. Claimant's average weekly wage is modified to $690.11. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BERRY JEAN HALL, Chief

ROY P. SMITH

Administrative Appeals Judge

NANCY S. DOLDER

Administrative Appeals Judge

In the Matter of Michael Roberts,
Claimant

v.

Custom Ship Interiors,
Employer

and

Director, Office of Workers' Compensation Programs,
Party-In-Interest

Filed: April 21, 2000

Case No. 1999-LHC-3047

OWCP No.: 6-177670

Ralph R. Lorberbaum, Esquire
For the Claimant

Lawrence Craig, Esquire
Frank Sioli, Esquire
For the Employer/Carrier

Phillip Giannikas, Esquire
For the Director, OWCP

Before: Linda S. Chapman
Administrative Law Judge

DECISION AND ORDER

Pursuant to a Notice of Hearing and Pre-Hearing Order issued on November 5, 1999, a hearing was held on this claim on January 12, 2000, in Tampa, Florida, at which time the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. At the hearing, I admitted the following exhibits into evidence: ALJ 1: Notice of Hearing and Pre-hearing Order; ALJ 2: Claimant's statement of the issues dated January 5, 2000; and ALJ 3: Employer/Carrier's Notice of Compliance and Motion for Enlargement of Time. Also admitted into evidence were Claimant's Exhibits 1 through 21 and Employer's Exhibits 1 through 6, 8 through 9, 11 through 13, and 15-34[1]. On January 31, 2000, Employer/Carrier submitted three job analyses questionnaires to be entered into evidence as part of Employer's Exhibit 18. By letter of January 31, 2000, Claimant's Counsel objected to the Employer's post-hearing filing of these job analysis forms, on the grounds that the

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[1] At the time of the hearing, the exhibit designated as Employer's Exhibit 34 was blank, although Employer's counsel represented that it was to contain pay stubs from August 13, 1997, through August 26, 1998 (Tr. 159). It was admitted, conditioned on the Employer actually supplying a copy of the pay stubs to the Court and the Claimant; on January 24, 2000, I received this material from the Employer. In addition, at the hearing, Employer's counsel stated that Exhibit 12, which was blank, was intended to represent an accumulation of Employer's Exhibits 1 through 33 (Tr. 28). On that basis, the exhibit was admitted, with a ruling reserved on its admission as evidence in support of the request for Section 8(f) relief. I note that Employer's Exhibits 2, 6, 8, 19-24, and 26 are completely blank. I also note that it was exceedingly difficult to wade through the medical evidence submitted by both the Claimant and the Employer, which was extremely disorganized and repetitive.

record had not been left open for the filing of such evidence. On March 1, 2000, I issued an Order excluding these documents from the record. Following the hearing, I received post hearing briefs from the Claimant, the Employer, and the Director, which I have considered in making my determination on this claim.

STATEMENT OF THE CASE

The Claimant's Testimony

The Claimant testified at the hearing, as well as in a prehearing deposition (EX 9). The Claimant was born on November 29, 1944, and has a high school diploma (Tr. 41). He has no other education or vocational training, and his past work has included carpenter work, remodeling, finish-work and construction. He cannot type or use computers (Tr. 42). The Claimant served in the Army for two years in Vietnam and was honorably discharged (Tr. 45-46). He also attended flying school, until he crashed a Beechcraft airplane in about 1970; he was not injured in the crash (Tr. 78, 110). The Claimant did some survey work in Alaska, and opened a radio station in Montana at one time, building it, selling air time, and playing music (Tr. 79-80).

At the time of his injury the Claimant had been employed by the Employer for approximately nine years, though his work was seasonal, covering about two-thirds of the year (Tr. 43, 81). The Claimant did not seek other work during the periods when he was laid off by the Employer (Tr. 81-82). His work at CSI included remodeling, finishing, laying carpet, paneling, putting in bulkheads, wallpapering, steel and stud work, and tearing out ceilings (Tr. 46, 83). He typically worked six days a week for a total of about 60 hours (Tr. 44). He was paid overtime wages for time exceeding 40 hours per week, as well as a weekly per diem of approximately $500.00, depending on how many days he worked. The per diem was used to pay for lodging and

food when they were not provided by the Employer or the owner of the ships (Tr. 101-102). The Claimant traveled often with CSI (Tr. 82-83). At the time of his injury, he was working on the Carnival Cruise Ship the "Ecstasy," and he was provided with both a room and food at no cost to him (Tr. 52-54). In past work with CSI, the Claimant lived in hotels and paid for his own food (Tr. 54-55).

On August 21, 1998, the Claimant was operating an 80 pound chipping hammer when a steel bunkbed fell from the wall, striking him on the head, and possibly on the shoulders (Tr. 46-48). While he did not lose consciousness, he was dazed, and lay down on a table in an adjacent cabin (Tr. 49). He reported the incident to his supervisors and sought medical attention from a physician on the ship a day or two later (Tr. 49-50). At that time he was experiencing back, neck, head and right leg pain (Tr. 50). He tried to go back to work doing very light work, but was unable to do so (Tr. 50-51, 59). The Claimant testified he only went back to work for one day, but records reflect that he was paid for 100 hours of work after his injury. The Claimant believed this payment might have been made because he remained on the ship for some time, hoping his condition would improve (Tr. 77). Thereafter, the Claimant visited a doctor in Newport News, who prescribed pain medication and told him to rest (Tr. 51). Ultimately, the Claimant flew to Miami to retrieve his vehicle and then drove to Hernando, Florida, where relatives could assist him (Tr. 51-52, 84).

In October of 1998, four or five weeks after arriving in Florida, the Claimant began seeing Dr. Perry of the Bonati Institute (Tr. 55, 86; C'S 16). The Claimant knew that Dr. Perry was neither a neurologist nor an orthopaedic surgeon (Tr. 87). The Bonati Institute, which is about 75 miles from the Claimant's home in Florida, was recommended to him by a relative who is a nurse (Tr. 86-87). The Claimant was still experiencing pain in his back, right leg, shoulders and neck (Tr. 56). The doctors at Bonati prescribed physical

therapy, which he underwent; and they indicated that he should undergo back surgery (Tr. 556-57). The Claimant wants to have this surgery because he believes it will help him, and the predicted recovery rate is 80 to 90 percent (Tr. 58).

The Claimant saw Dr. Turner (who is an orthopaedic surgeon at the Bonati Institute) once (Tr. 88). He also saw Dr. Mork (also an orthopaedic surgeon at the Bonati Institute) several months later, and Dr. Kellogg, whom the Claimant believed to be a chiropractor, physical therapist and surgeon (Tr. 89, 95).[2] The Claimant was told that he could return to work, but he then hurt his middle back while moving things in his truck. After that, Dr. Mork told him that he should undergo surgery (Tr. 90). According to the Claimant, Dr. Mork told him that he would need two surgeries, but that he might be able to do them at the same time (Tr. 95). He was shown a video of the surgery and informed of the risks, but he was not aware that paralysis was a risk, or that the surgery was experimental (Tr. 95-96, 98, 107). The Claimant postponed the surgery, but he did not recall if that was his idea or Dr. Perry's (Tr. 92-93). He has not discussed the surgery with any other doctors except Drs. Castellvi and Goldberger, both of whom said he was not a surgical candidate (Tr. 97, 99-100).

Since his injury, the Claimant has experienced pain throughout his entire back, though his low back has gotten better (Tr. 91). Dr. Perry has instructed him to avoid lifting more than ten pounds, twisting, bending, and standing or sitting for long periods of time (Tr. 60). The Claimant was taking medication prescribed by Dr. Perry, but has used all of it and has not been authorized to visit Dr. Perry again (Tr. 61). He is still experiencing pain in his upper, lower and middle back; his shoulders; his neck; and his right leg; he finds it painful to travel long distances in a car (Tr. 61, 64).

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[2] There are no records from Dr. Kellog in the exhibit file.

On cross examination, the Claimant admitted that his head had gotten better, and that his right shoulder was not as painful before, but he was having more pain in his left shoulder (Tr. 94). His neck and upper back have gotten worse over the last several months (Tr. 166).

The Claimant testified that he saw Dr. Goldberger for about 20 minutes and Dr. Castellvi for about 10 minutes, and that neither of these physicians treated him (Tr. 66).

The Claimant has not worked for the Employer since shortly after his injury and has not been offered any employment from the Employer, because of his physical limitations (Tr. 59). The Claimant looked for work on the Monday prior to the hearing, when he attempted to find the jobs that Vocational Expert Maisel located (Tr. 60). He visited Clairston Industries, Plastic Tech, Action Plastics, Signature Brands, and Townley Engineering, but none of them offered him a job (Tr. 62). Action Plastics said they were not hiring, Townley Engineering required lifting 50 pounds; and Interim said he would have to apply at Townley Manufacturing (Tr. 63). The Claimant does not believe that he could work at an assembly line or sit at a table painting objects (Tr. 65-66). The Claimant believes he could withstand no more than a 45 minute commute to work (Tr. 68). On cross-examination the Claimant admitted that he had a Ford truck which he drove to his deposition, a trip of 20 to 25 minutes each way (Tr. 72-73). The Claimant also drove some 75 miles to the Bonati Institute approximately three days a week, a trip of an hour and a half each way (Tr. 87, 105). The Claimant has no income; he is using his savings to live and is contemplating liquidating some of his assets (Tr. 60).

The Claimant did not have any physical restrictions or disabilities and was not under the regular care of a physician before his injury (Tr. 45, 111). While the Claimant was involved in a car accident in 1965, he did not suffer any permanent injuries from this accident (Tr. 110-11). Before

his injury, the Claimant enjoyed climbing, riding bicycles, swimming, hunting, and fishing, and considered himself to be in good health (Tr. 44-45). He still fishes (Tr. 74). Since his injury, the Claimant has visited his home in Louisiana, where he did some cleaning and assisted others in some repairs, though he mostly watched others work (Tr. 74).

Riverside Mercury West Medical Center

The Claimant visited Riverside Mercury West Medical Center in Hampton, Virginia, on August 28, 1998. The Claimant complained of neck and back pain, starting on August 20, 1998. After examination, the treating physician's impression was that he had acute cervical strain and back pain, and that the x-ray showed "spondylosis C C4-5, C5-6, C6-7" (EX 15).

The Bonati Institute: Drs. Perry, Turner, and Mork and G.C.O.C. Physical Therapy

Following his move to Florida, the Claimant chose Dr. Michael Perry, a diplomat of the American Board of Internal Medicine (CX 11), as his attending physician (CX 16). Dr. Perry saw the Claimant for an initial evaluation on October 1, 1998, noting that the Claimant was experiencing pain in his back and leg, and to a lesser extent, in his neck. The Claimant's problems included numbness and tingling in the toes of his right foot and occasionally the left, as well as sharp pain that extended down the back of his right thigh and calf and occasionally the left. The Claimant had a limp, and occasional neck pain with some ringing in his left ear (CX 9).

A physical examination of the Claimant's neck showed painful rotation to the right, painful and limited lateralization to both the right and left sides, painful flexion, and limited extension of the neck. A physical examination of the back showed decreased reflexes in the right ankle and

decreased dorsiflexion of the right foot. The straight leg raising test was positive on the right side, and the motor ability was measured at 4 out of 5 on the right flexors. Lateralization of the lumbar spine to 20 degrees and flexion of the lumbar spine to 45 degrees were painful, as was palpation of the lumbar spine on the right and left sides. Dr. Perry concluded that the Claimant had "acute musculoskeletal sprain/strain of the cervical and lumbar spine" and "radicular symptoms, right lower extremity" (CX 9). He indicated that the Claimant should undergo x-rays, an MRI, nerve testing, and a PT evaluation of the lumbar spine, and referred him to the orthopedic surgeons (CX 9; EX 16-76, 82). In the meantime, Dr. Perry prescribed physical therapy and Relafen.

X-rays were taken on October 1, 1998, and read by Dr. Perry. The lumbar spine view showed mild degenerative changes throughout the area, as well as narrowing of the disc space and the foramen space at the L5/S1 level. The T12/L1 disc space was also slightly narrowed. There was some spurring of the lower thoracic/upper lumbar region vertebral bodies and phleboliths were detected in the pelvic region. Finally, there were minimal degenerative changes of the facet joints bilaterally. (CX 9, 22; EX 16 at 85-88).

On October 13, 1998, after reviewing the Claimant's symptoms and conducting a physical examination, Dr. Leonel P. Limonte, who is also associated with the Bonati Institute, performed a neurological evaluation in which he examined the Claimant's cranial nerves, motor, sensory, cerebellar, gait, and reflexes. Dr. Limonte concluded that the Claimant had right L5 radiculopathy (CX 9, at 6-7).

On October 14, 1998, Dr. Turner (who is an orthopedist at the Bonati Institute) examined the Claimant, and reviewed his October 13, 1998 MRI of the lumbar spine, which he found to show mild to moderate degenerative disc disease at L4/L5 and L5/S1, a bulging disc, bilateral

foraminal narrowing, herniation, and stenosis at L5/S1. The x-rays revealed a spondylolisthesis at L3/L4 and degenerative joint disease at the left L4/L5 facet and the L5/S1 facet bilaterally.[3] Dr. Turner concluded that the Claimant had back pain with radiculopathy at S1 on the right and a bulging disc at L5/S1. He scheduled the Claimant for a lumbar discectomy and foramenoplasty at L5/S1 on the right side. Dr. Turner noted that the surgery might not relieve all of the Claimant's symptoms, but that they would be treated conservatively with physical therapy pending the outcome of the surgery. However, it was possible that additional surgery might be needed. (CX 9 at 3-4).

On October 16, 1998, Dr. Alberto M. Righi, M.D., read the Lumbar Spine Series x-ray of October 1, 1998, and concluded that it showed degenerative disc disease at both L4-5 and L5-S1 (worse at L4-5) and at T10 through L1, as well as "[m]ild compression abnormality of T12 on an osteoporotic base" (CX 9; EX 16 at 81). Dr. Righi also read the October 13, 1998, MRI of the Claimant's lumbosacral spine and found that L1-2, L2-3, and L3-4 were type 1; that L4-5 was type 1 to 2 centrally, and that L5-S1 was "type 2 circumferentially with facet hypertrophy" (CX 13; EX 16 at 67, EX 29).

The Claimant underwent physical therapy at G.C.O.C. Physical Therapy Rehabilitation Center in Hudson, Florida (CX 14; EX 27). When he began the therapy in October 1998, the Claimant's chief complaint was right leg

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[3] Although Dr. Turner did not specify what x-rays he reviewed, he appears to be referring to the October 1, 1998 x-rays, as there is no other x-ray evidence in the exhibit file. Dr. Turner does not discuss or refer to the degenerative disc disease at T-10 through L-1 as reported by Dr. Righi, who also reviewed these x-rays. In addition, Dr. Righi specifically stated that the x-rays showed no evidence of spondylolisthesis or spondylolysis.

pain and lower back pain, and he rated his level of pain as an eight on a scale of one to ten. A November 17, 1998, report indicates the Claimant's pain had been reduced to the level of a two on a scale of one to ten and that his range of motion had increased (CX 14; EX 16 at 42, EX 27 at 22). By December 17, 1998, the Claimant's pain was a one on a scale of one to ten. A Progress Report dated January 5, 1999, shows that the Claimant was ready to be discharged from therapy (EX 16, 38): in fact, on January 7, 1999, the Claimant was discharged because he did not report for his therapy (EX 16, 36).

The Claimant's surgery, which had been scheduled for December 1, 1998, was cancelled when the Claimant failed to report for his preoperative visit on November 24, 1999 (EX 16 at 21). Dr. Perry saw the Claimant again on January 5, 1999, at which time the Claimant reported that he had less discomfort in his lumbar spine and right leg (CX 9). The Claimant had been exercising, and was not taking any significant pain medication. While he continued to experience some pain, especially upon bending, squatting or lifting his right leg, he felt he could tolerate the pain without surgical intervention. Dr. Perry recommended exercises and therapy and concluded that the Claimant could return to work the following Monday with restrictions to the lumbar spine (CX 9 at 4). The Claimant's return to work slip, completed by Dr. Perry and dated January 5, 1999, indicates the Claimant could return to work effective January 11 full time, but could lift no more than 25 pounds (CX 9, 14; EX 13, 16 at 37).

On January 28, 1999, Dr. Perry saw the Claimant, who reported that he had been bending over his truck when he suddenly felt pain in "the mid to lower thoracic region on the right and left flank." He was still experiencing this pain in both flank areas, more pronounced on the left, and had been taking over the counter ibuprofen. Dr. Perry noted that the pain was not in the Claimant's lower lumbar

region and that he did not have radicular symptoms in his legs. Dr. Perry found mild muscle spasms and pain of the lower left thoracic vertebral region, which he diagnosed as "musculoskeletal sprain/strain, lower thoracic region." Dr. Perry prescribed medication and two weeks of thrice-weekly physical therapy, noting that conservative treatment would be sufficient at that time (CX 9, 16; EX 16 at 33,17 at 6, 27 at 14).

On February 18, 1999, the Claimant saw Dr. Perry again and indicated that the pain in his mid back and thoracic area had lessened somewhat, but that he continued to have pain in his right buttock down the back of his thigh and calf and numbness in the middle toes of the right foot. The Claimant had not been approved for physical therapy. Dr. Perry prescribed thrice-weekly physical therapy for a period of four weeks, encouraged the Claimant to undergo ESI's (epidural steroid injections) with Dr. Hirschauer and advised him to remain out of work for a month (EX 16, at 27-28). Dr. Perry observed that conservative treatment had not abated the Claimant's symptoms and that, if the ESI's were not beneficial, surgical intervention might be needed (CX 9 at 16-17).[4]

On March 29, 1999, Dr. Perry saw the Claimant and noted that he had been evaluated by Dr. Goldberger, who had the Claimant undergo another MRI and informed him that he would probably need surgery[5]. Dr. Perry told the Claimant that he should bring his MRI's for Dr. Mork to review, and he should remain off work until he met with Dr. Mork (CX 9,17).

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[4] There is no indication that the Claimant ever received epidural steroid injections.

[5] As noted below in my discussion of Dr. Goldberger's examinations of the Claimant, Dr. Goldberger vehemently denies ever having told the Claimant he was a candidate for surgery (CX 17).

Dr. Anthony Mork, who is certified by the American Board of Orthopedic Surgery (CX 12), saw the Claimant on April 15, 1999. Dr. Mork reviewed the MRI taken on March 23, 1999, finding bulging discs, foraminal narrowing, herniation, and stenosis at L4/L5 and L5/S1. Dr. Mork also reviewed the October 1, 1998, x-rays. He concluded that the Claimant had back pain with right sided S1 radiculopathy, back pain/facet syndrome at L5/S1 right, and bulging discs and stenosis at both L4/L5 and L5/S1 right, and recommended that the Claimant undergo a lumbar foramenoplasty at L5/S1 on the right with arthroscopic laser arthrodesis at L5/S1 on the right. Dr. Mork explained the procedure to the Claimant, and noted that if the surgery did not resolve all of the Claimant's symptoms, other surgical intervention might be necessary (CX 9, 20).

A May 26, 1999, letter from Dr. Perry to the Claimant reflects that the surgery was not approved and the Claimant was being placed on "out of work status." Dr. Perry indicated the Claimant could not lift more than ten pounds, stand or sit for prolonged periods, twist, squat, bend, or drive more than thirty minutes, and must be able to change positions frequently (CX 10).

Dr. Goldberger

Dr. Richard I. Goldberger, who is board certified by the American Board of Orthopaedic Surgery (CX 18; EX 32) conducted an independent medical evaluation of the Claimant on March 2, 1999. Dr. Goldberger reviewed records from the Bonati Institute, various x-ray and MRI reports, physical therapy records, and Concentra Managed Care Services documentation (EX 18). He examined the Claimant, and concluded that he had "possible L5/S1 herniated disc with degenerative changes of L4/5." Dr. Goldberger ordered a high quality MRI of the lumbosacral spine, which was conducted on March 23, 1999, and read on

March 24, 1999 by Dr. William Hearn, who concluded that the Claimant had a minimal bulging annulus at L4-5, which was of no clinical significance, a possible hemangioma at the L4 and L5 vertebral body segments, and degenerative disc disease (CX 19; EX 18 at 13, EX 25).

On April 8, 1999, Dr. Goldberger again saw the Claimant and concluded that the 4/5 and 5/1 levels were degenerative, with a possible minor herniation at 5/1. He did not think the herniation was a surgical problem and was unable to determine the impact of the 5/1 disc changes upon the Claimant's symptoms (CX 17; EX 18 at 14-15). Dr. Goldberger determined that the Claimant should return to indefinite light duty work, should not undergo surgery, and should not undergo epidural steroid injections unless he had an acute episode.

In a notation dated April 28, 1999, Dr. Goldberger disputed the statement in Dr. Mork's report that Dr. Goldberger had indicated the Claimant should undergo surgery. Dr. Goldberger emphasized that he had never made such a determination. As reflected in an April 29, 1999, notation, Dr. Goldberger suggested to the carrier that the Claimant might need a further opinion (EX 18 at 14). On December 21, 1999, Dr. Goldberger noted that he had spoken with the Employer's attorney concerning the Claimant's condition and had repeated that he did not feel the Claimant was a candidate for surgery, but that he would approve a discogram at L5/S1 in order to confirm this. He also indicated that the Claimant was a candidate for light duty work, with lifting not to exceed the 25-30 pound range repetitively, and no bending, stooping, or standing for extended periods without changing positions every hour

and stretching or sitting down occasionally (CX 17 at 5; EX 18 at 2).[6]

In a January 22, 1999, letter, the Employer indicated that it did not have a position available for the Claimant which would incorporate Dr. Goldberger's physical restrictions (CX 21).

Dr. Castellvi

Dr. Antonio Castellvi, a diplomate of the American Board of Orthopaedic Surgeons (EX 31), examined the Claimant on November 18, 1999. Dr. Castellvi diagnosed the Claimant with lumbar or lumbosacral intervertebral disc degeneration. He concluded that surgery was not needed and that the Claimant should lose weight and exercise (CX 20; EX 3).

Dr. Castellvi testified at a deposition on February 17, 2000. He stated that he had reviewed medical records sent to him regarding the Claimant, although he did not have them with him and could not recall their content. He did recall taking a history from the Claimant, in which the Claimant indicated that he had no prior neck or back problems before the injury at issue. Dr. Castellvi's review of the Claimant's systems and past medical history were "really unremarkable," and his physical examination was basically normal. The Claimant had no sciatic stretch signs and his motor examination was normal for the upper and lower extremities, indicating no radiculopathy. His reflexes were normal. These findings indicated that the Claimant has no peripheral nerve injuries; they were also consistent with the Claimant's complaint of low back pain. Dr.

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[6] There is also a prescription slip in the file, signed by Dr. Goldberger, dated May 27, 1999, for "FCE" (presumably, functional capacity evaluation); there is no indication that the Claimant underwent such an evaluation.

Castellvi diagnosed the Claimant with minor degenerative disc disease, based on his MRI of March 23, 1999. To the best of his recollection, the MRI did not show any herniated discs or clinically significant bulging discs (EX 8 at 4-8,18).

Dr. Castellvi felt that the Claimant should lose weight and exercise. He did not provide any impairment ratings for the Claimant. He felt the Claimant was not a surgical candidate; in fact, Dr. Castellvi had never heard of laser arthrodesis surgery. He stated: "You obviously cannot fuse bone with a laser only. So whether you want to use a laser - I don't know what that means" (EX 8 at 8-10).

Upon being asked to assume that Drs. Perry and Mork recommended that the Claimant undergo a lumbar discectomy and foramenoplasty, Dr. Castellvi indicated that it was not "good medicine" to operate on the Claimant and indicated that if "somebody else thinks he's a surgical candidate, obviously I think they're wrong" (EX 8 at 13-14). He did not believe a discogram was needed for the Claimant (EX 8 at 16-17).

Dr. Castellvi emphasized that he did not perform an IME; rather, he was engaged to render a second opinion. Therefore, he would not address permanency or work restrictions (EX 8 at 10).

Vocational Testimony and Evidence

Gary W. Maisel, a certified vocational evaluator and rehabilitation counselor (EX 30) with Concentra Managed Care, Inc., prepared a Vocational Assessment Report for the time period of November 28, 1999, to January 6, 2000, and testified as a vocational expert at the hearing in this matter (EX 5; Tr. 116-117). Mr. Maisel reviewed the Claimant's medical records, as well as the records from the case management nurses, and met with the Claimant on December 22, 1999, to conduct a vocational interview (Tr. 117, 120-121). The Claimant described his pain and

limitations and recounted his employment history (Tr. 121-122). Mr. Maisel found the Claimant had the vocational skills of a carpenter, but had not gained any transferrable occupational skills from his work at the radio station and as a surveyor (Tr. 122). Mr. Maisel reviewed Dr. Goldberger's restrictions on the Claimant, which included lifting no more than 25 to 30 pounds, which was within the medium range of work difficulty. He also reviewed Dr. Perry's letter of May 26, 1999, in which Dr. Perry described the Claimant's physical restrictions. Mr. Maisel was not provided with the January 5, 1999, report from the Bonati Institute, indicating that the Claimant could return to work full time, with lifting restrictions of no more than 25 pounds and no continuous twisting, bending or squatting (Tr. 123-125, 153-154).

Based on Dr. Goldberger's restrictions, Mr. Maisel found the Claimant could engage in unskilled light and sedentary jobs, including light production, production/assembly, cashiering, and courier positions. Mr. Maisel located jobs in these fields that were within 40 or 50 miles of the Claimant's home (Tr. 125-126). The salaries ranged from $6.00 to $7.25 per hour, and all the positions were located in Ocala, Florida (EX 5). He identified positions at Clairston Industries, Plastitech, Action Plastics, Signature Brands, Townley Engineering and Manufacturing (via Remedy Staffing), and Silver Springs, all of which he felt were within the restrictions placed upon the Claimant by Dr. Goldberger (Tr. 126-129). On cross-examination, Mr. Maisel admitted that the Clairston, Plastitech, Action Plastics, and Signature Brands packing positions would require the employee to bend, thus violating Dr. Goldberger's restrictions (Tr. 139). The Signature Brands assembly job did not require bending, but required lifting 30 pounds in violation of Dr. Perry's restrictions (Tr. 142). The Townley Engineering position required occasional bending in violation of Dr. Goldberger's restrictions, but the bench assembly position at Townley Engineering did not require

bending (Tr. 142-143). The production jobs would require the Claimant to meet a quota, which Mr. Maisel admitted would be difficult for the Claimant to do (Tr. 147-149). According to Mr. Maisel, the Silver Springs ticket seller/cashier position would also meet Dr. Perry's May 26, 1999, restrictions, although the employee is required to use a computerized cash-register (Tr. 129, 137). All of these positions except the one at Signature Brands would also meet the restrictions placed upon the Claimant in the Bonati Institute's January document (Tr. 129-130). Mr. Maisel stated that the positions he identified were continually open (Tr. 132). Mr. Maisel sent job analysis forms based on these positions to Dr. Goldberger to review, but had not received them back at the time of the hearing (Tr. 134).[7] He did not send job analyses to Dr. Perry or Dr. Mork for their approval (Tr. 138 and 147). Mr. Maisel did not inquire of the potential employers whether they would hire someone with the Claimant's physical problems (Tr. 150).

Barbara J. Harvey, a Senior Case Manager at Concentra Managed Care, Inc. who is a certified rehabilitation provider and case manager (EX 33), prepared a January 7, 2000, labor market survey of suitable employment in Virginia. Ms. Harvey took into account the physical restrictions imposed by Dr. Goldberger. Based on these restrictions, Ms. Harvey concluded the Claimant could perform sedentary, light and light to medium jobs. She identified as potential occupations the positions of outside deliverer; cashier II; hotel clerk; and assembler, production. A total of nine openings were found for these positions, in cities including Chesapeake, Norfolk, and Virginia Beach. The salaries ranged from $5.15 to $6.50 per hour.

At the hearing Mr. Maisel reviewed the labor market survey conducted by Ms. Harvey and agreed that based on

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[7] As discussed earlier, I did not admit these exhibits into the record.

both Dr. Goldberger's and the Bonati Institute's January 1999 restrictions, the Claimant could perform all of the positions identified by Ms. Harvey. However, he felt that only the hotel clerk and parking lot cashier positions would meet Dr. Perry's May 1999 restrictions (Tr. 130-131). On cross-examination, Mr. Maisel acknowledged that the parking lot cashier position did call for occasional driving to patrol the parking areas. He was unsure as to the length of such driving, or what Dr. Perry's thirty minute driving restriction meant (Tr. 144). He also acknowledged that the job at the Red Roof Inn required lifting 10 to 15 pounds, in violation of Dr. Perry's restrictions (Tr. 145). The Sheraton One Hotel position required mostly standing, thus violating Dr. Perry's restrictions (Tr. 145). However, the job description also stated that sitting was allowed, and Mr. Maisel felt that if the Claimant could sit every 30 minutes, he could do the job (Tr. 151). He also stated the jobs at the Glass Baron might require bending, and the job at Microlabs required lifting in excess of Dr. Perry's restrictions (Tr. 146-147).

Testimony and Evidence Concerning the Claimant's Average Weekly Wage

The record includes the Claimant's W-2 forms for 1997 and1998 (CX 8), a list of weeks worked by the Claimant during the year prior to his injury, with the number of days worked during each week; a copy of the interrogatories and request for production propounded upon the Employer by the Claimant addressing his dates of work; a list of the actual days worked by the Claimant, to the extent the Employer's records permitted such a listing; and some other payroll records for the Claimant. Claimant's Exhibit 8 also includes a list of weeks worked by the Claimant for the year preceding his injury, with corresponding gross and net pay for each of those weeks. Employer's Exhibit 34, submitted post-hearing, includes records from the Employer listing the

dates, number of hours, wages and locations of the Claimant's work from February 26, 1997 to July 29, 1998.

STIPULATIONS

The parties have stipulated, and, based on the record, I find that:

1. Title 33 U.S.C. § 901 et. seq. applies to this claim.

2. The Claimant was injured on August 21, 1998, in the course of his employment with the Employer.

3. The Claimant timely filed a notice of injury.

4. The Employer timely filed its notice of injury.

5. The Claimant timely filed his claim, and this claim is properly before me for a hearing.

6. The Employer, Custom Ship Interiors, is properly named as potentially liable.

7. The Claimant was paid compensation from August 22, 1998, to July 15, 1999, at the rate of $443.79 per week, based upon an average weekly wage of $665.68.

8. The Employer timely filed the initial claim for Section 8(f) relief.

ISSUES

1. The Claimant's average weekly wage.

2. The nature and extent of the Claimant's disability.

3. Whether the Claimant is entitled to undergo surgery.

4. Whether the Claimant is entitled to medical benefits.

5. Whether the Claimant is entitled to an attorney's fee.

6. Whether the Employer is entitled to Section 8(f) relief.

7. Whether the Employer is entitled to submit additional medical evidence in support of its claim for Section 8(f) relief.

DISCUSSION

The Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw her own inferences from it, and she is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968), *Reh. Denied*, 391 U.S. 929 (1968); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Seaman v. Jacksonville Shipyard, Inc.*, 14 BRBS 148.9 (1981); *Brandt v. Avondale Shipyards, Inc.*, 8 BRBS 698 (1978); *Sargent v. Matson Terminal, Inc.*, 8 BRBS 564 (1978).

The parties agree that the Claimant was injured on August 21, 1998, in the course of his employment. The Employer has paid the Claimant temporary total disability payments from August 22, 1998 to July 15, 1999.[8]

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[8] There is nothing in the record as to the reason for the Employer terminating the Claimant's benefits.

Nature and Extent of Disability

Having established an injury, the burden rests with the Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). The determination of when maximum medical improvement is reached so that a claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT) (2nd Cir. 1990); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). An employee reaches maximum medical improvement when his condition becomes stabilized, or when he is no longer undergoing treatment with a view toward improving his condition. *Thompson v. Quinton Enterprises, Limited*, 14 BRBS 395 (1981); *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122 (5th Cir. 1994).

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows that he is unable to return to his former employment establishes a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991).

The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of

"maximum medical improvement." The determination of when maximum medical improvement is reached so that a claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. *Lozada v. Director, OWCP*, 903 F.2d 168 (2nd Cir. 1990); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988).

In this case, all of the medical evidence points to the conclusion that as a result of his work injury, the Claimant cannot return to his former work as a remodeler and finisher. The restrictions assessed by both Dr. Perry and Dr. Goldberger confine the Claimant to a limited range of medium work, at best, while his previous job, as he described it, required him, among other things, to operate tools weighing 80 pounds. Thus, the evidence clearly establishes that the Claimant cannot return to his former position.

However, not one of the physicians who treated or evaluated the Claimant has offered an opinion as to whether the Claimant has reached maximum medical improvement. Nor has any physician provided anything resembling a disability rating, although Drs. Perry and Goldberger have placed restrictions on the Claimant's work-related activities. Thus, there is very little medical evidence in the record on which to make a determination of whether the Claimant has reached maximum medical improvement. At most, the evidence reflects general agreement among the orthopedists who examined the Claimant that he suffers from degenerative disc disease in his lower back, as well as a bulging and possibly herniated disc, which may or may not be clinically significant. However, it is not clear whether the Claimant's complaints of pain can be expected to improve, or whether his condition has become permanent. On the one hand, Dr. Castellvi, who examined the Claimant most recently, refused to address the issue of the permanency of

the Claimant's condition, although he did not think surgery, or even a diagnostic discogram, was necessary. On the other hand, Dr. Goldberger, who also thinks that the Claimant is not a candidate for surgery, nevertheless thought a discogram would be appropriate to rule out that option. Dr. Mork, who has not seen the Claimant since March 1999, thought that he needed surgery. The Claimant has not been back to Dr. Perry since March 1999, but that is because the Employer has not authorized him to do so.[9]

There simply is insufficient medical evidence in the record, in the form of physician opinions and determinations, for me to make a factual finding that the Claimant has reached maximum medical improvement. I certainly do not have the authority or expertise to review the medical evidence and make what essentially would be a medical opinion about the Claimant's condition. If there is any doubt as to whether the employee has recovered, such doubt should be resolved in favor of the Claimant's entitlement to benefits. *See Fabijanski v. Maher Terminals*, 3 BRBS 421, 424 (1976), *aff'd mem. sub nom. Maher Terminals v. Director, OWCP*, 551 F.2d 307 (4th Cir. 1977).

Thus, while the Claimant is not currently undergoing treatment with an eye to improving his back condition, this is not because he has been released from any such treatment, but because his medical treatment is in limbo pending the resolution of his claim. Indeed, Dr. Perry has placed the Claimant on "out of work" status, pending surgery. Resolving any doubts as to whether the Claimant has recovered in favor of his entitlement to benefits, I find that the Claimant has not reached maximum medical

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[9] It appears that the Claimant's treatment at the Bonati Institute is essentially "on hold" pending the resolution of the Claimant's claim, and the resumption of authorization for treatment.

improvement, and thus his disability remains temporary in nature.

The Extent of Claimant's Disability

The question of extent of disability is an economic as well as a medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). A claimant's credible testimony alone, without objective medical evidence, on the issue of the existence of disability may constitute a sufficient basis for an award of compensation. *Ruiz v. Universal Maritime Service Corp.*, 8 BRBS 451, 454 (1978); *Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). In addition, claimant's credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award of compensation notwithstanding considerable evidence that claimant can perform certain types of work activity. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78, (5th Cir. 1991). When the facts support a finding in favor of either party, the choice between reasonable inferences is left to the administrative law judge and may not be disturbed if it is supported by the evidence. *Id.* at 945, 81.

Where it is uncontroverted that a claimant cannot return to his usual work, he has established a *prima facie* case of total disability, and the burden shifts to the employer to establish the availability of suitable alternate employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). To do so, the employer must show the existence of realistic job opportunities which the

claimant is capable of performing, considering his age, education, work experience, and physical restrictions. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If the employer satisfies its burden, then the claimant, at most, may be partially disabled. *See, e.g., Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). However, the claimant can rebut the employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Rogers Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

As I have found that the Claimant cannot return to his former employment as a remodeler and finisher, the burden now shifts to the Employer to prove the existence of suitable alternate employment for Claimant. Relevant factors in making such a determination include the Claimant's age, background, employment history and experience, and intellectual and physical capabilities, as well as the reasonable availability of jobs "in the community for which the Claimant is able to compete and which he could realistically and likely secure." *Washington Metropolitan Area Transit Authority*, 36 F.3d 375 (4th Cir. 1994), *quoting Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 201 (4th Cir. 1984), *quoting New Orleans (Gulfwide) Stevedores v. Turner*,661 F.2d 1031, 1042-43 (5th Cir. 1981).

A determination on the issue of suitable alternate employment must begin with a determination of the relevant labor market. In this case, the Claimant's last place of employment was on the cruise ship where he was injured, in Chesapeake, Virginia. However, this was not his place of residence. Due to the nature of his work, he traveled from location to location, depending on the job, and

either lived in motels or on the ships where he worked for the duration of the jobs. In fact, the Claimant has a home in Louisiana. However, after his injury, he moved to Florida, to live with family who could assist in his care.

The Fourth Circuit has stated that:

> A determination of the relevant labor market for purposes of determining eligibility for LHWCA benefits should reflect the Act's "concern for . . . economic consequences."
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> * * *
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> We find the most persuasive definition of the relevant labor market in a concurring opinion by our late Chief Judge Harrison Winter: "It is by now well-established that, in order to defeat a claim for benefits as a result of an alleged permanent total disability, the burden is on the employer to prove the existence of a suitable job presently available to the claimant in the community in which he lives."

Washington Metropolitan Area Transit Authority, 36 F.3d 375, 381 (4th Cir. 1994), quoting *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 451 (4th Cir. 1978)(Winter, J., concurring) (emphasis added). *See also, Godfrey v. Henderson*, 222 F.2d 845, 849 (5th Cir. 1955).

The Court also noted that "the presence of a legitimate purpose influencing a post-injury relocation is a significant factor warranting consideration in a determination of the relevant labor market." While noting that evidentiary hardships might inure to an employer where a claimant moves a long distance away, or is

excessively transient after an injury, the Court also stated that:

> [a]n inflexible rule bounding an injured claimant to the community where he was injured would needlessly, and possibly unlawfully, fetter his personal choices as to possible residences as well as hamper relocation efforts for the purpose of securing employment. Such a rule would contravene both the LHWCA's economic focus on a 'claimant's capacity for work,' [citations omitted] and the policy of liberal construction of the LHWCA to provide a full and adequate remedy for an injured employee.

WMATA, supra, at 383 [citations omitted].

In this case, the nature of the Claimant's job was transient: he traveled to the job site, and lived there for the duration of the job; indeed, the Employer provided him with a per diem allowance to defray the costs of living away from home. The Claimant had no ties to the Chesapeake area, where his injury occurred, other than the fact that he was working for the Employer there. In fact, his home is in Louisiana. The Claimant testified that after his injury, he moved to Florida, to live with relatives who could help take care of him. He has remained there, and has established a network of physicians and therapists there. I find that the Chesapeake, Virginia area, which was not the Claimant's home, but was only a temporary work site, is not a relevant labor market. I also find that the Claimant had a legitimate reason to locate in Florida after his injury. Thus, the relevant labor market for purposes of demonstrating suitable alternative employment is Ocala, Florida.

The only physicians who have placed specific restrictions on the Claimant's work-related activities are Dr. Perry and Dr. Goldberger. By letter dated May 26, 1999, Dr. Perry indicated that the Claimant was restricted from lifting over ten pounds, prolonged periods of standing or sitting, continuous twisting, squatting, or bending, and prolonged periods of driving (over 30 minutes), and that he should be able to change positions frequently (CX 10). However, in an earlier notation after the Claimant's January 5, 1999 visit, Dr. Perry indicated that the Claimant was doing quite well, with intermittent but not severe pain, which he was able to tolerate without surgery, dated January 21, 1999. Dr. Perry released him to work on January 11, 1999 full time, but stated that he could only lift 25 pounds, could tolerate no prolonged periods of walking, standing, or sitting, and could do no continuous twisting or bending. His previously scheduled surgery was put off, and the Claimant was released to return to work, with a checkup scheduled in three months.

By February 18, however, Dr. Perry's notes suggest that the Claimant was continuing to have problems. Dr. Perry told him to remain out of work for a month, and consult with Dr. Hirschauer about epidural steroid injections. At his last visit to Dr. Perry on March 29, he was still having pain in his lower back; he had also been to see Dr. Goldberger, and he told Dr. Perry that Dr. Goldberger had indicated that he probably would need surgery. Dr. Perry sent the Claimant to Dr. Mork for discussion of surgery, and kept him out of work until that was resolved.

There is no explanation in the medical records of why Dr. Perry's assessment of the Claimant's work-related restrictions changed from the time of the January 5 visit to the May 26, 1999 letter. It does not appear that the Claimant was undergoing physical therapy during this time, nor did he have the epidural steroid injections recommended by Dr. Perry. The examination results on the two visits after

January 5 (such as they are) do not reflect a notable change in the Claimant's clinical findings. A reasonable inference is that Dr. Perry changed the restrictions at that time based on the Claimant's complaints of increased pain after bending over his truck. Nevertheless, as Dr. Perry is the Claimant's treating physician, and had the opportunity to treat and evaluate the Claimant on several occasions, I adopt his restrictions of May 1999. I also note that I had the opportunity to observe the Claimant at the hearing, and I found him to be a credible witness.

Dr. Goldberger, who examined the Claimant in March 1999, and also reviewed his records and test results, concluded that he could do light duty work, limited to lifting 25-30 pounds repetitively, with no bending or stooping; and that he could stand for extended lengths of time, with the option to change positions every hour and sit down periodically for short stretches.[10]

Although in his report, Mr. Maisel, the Employer's vocational expert, identified a number of positions in the Ocala area that he indicated were consistent with the restrictions imposed by Dr. Goldberger, on cross-examination he conceded that most of them would require the Claimant to bend, which would be in violation of Dr. Goldberger's restrictions. One of the assembly jobs, at Signature Brands, does not require bending, but requires lifting in excess of Dr. Perry's 25 pound restriction. Mr. Maisel also admitted that it would be difficult for the Claimant to meet a quota as required by the production jobs. Of the jobs identified by Mr. Maisel in the Ocala area,

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[10] It appears that Dr. Goldberger approved and recommended a functional capacity evaluation for the Claimant, but there is no evidence in the record that this was ever done.

only one appears to be suitable, that is, the position as a ticket seller/cashier in Silver Springs.[11]

The Fourth Circuit has found that an employer must present evidence that a range of jobs exists which is reasonably available, and which the claimant is realistically able to secure and perform. *See Lentz v. The Cottman Co.*, 852 F.2d 129 (4th Cir. 1988). I find that the availability of only one job, that is, ticket seller/cashier, does not constitute evidence of a range of jobs realistically available to the Claimant.[12]

The Claimant's Average Weekly Wage

In order to determine the rate of the Claimant's compensation, I must determine the Claimant's average weekly wage. As a threshold matter, I must determine what constitutes "wages" for the Claimant. Section 2 (13) of the Act defines wages as:

> . . . the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in

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11 Mr. Maisel indicated that a "computerized" cash register was used in this position. Even though the Claimant testified that he cannot type or use computers, there is no indication that the Claimant, a high school graduate who, among other things, operated his own business, would not be able to operate a cash register, computerized or otherwise.

12 Although the Board favors the view taken by the Fourth Circuit, it has found that an employer met its burden by securing a single actual, specific job offer for the claimant, who was capable of doing the work. *Shiver v. United States Marine Corp. Marine Base Exchange*, 23 BRBS 246 (1990). That is not the case here: the Claimant has not been offered a specific job as a ticket seller/cashier.

> force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, *i.e.*, whether it is intermittent or permanent, *Eleazar v. General Dynamics Corp.*, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. *Lozupone v. Stephano Lozupone and Sons*, 12 BRBS 148, 156-57 (1979).

In this case, the records reflect that the Claimant worked for 33 weeks and two days in the year prior to the injury. In addition, there is other significant evidence, as set forth below, that leads me to conclude that the use of section

10(a) would be unreasonable and that section 10(c) must therefore be applied.[13]

The Claimant testified that his work for the Employer was seasonal, and indeed his pay records reflect periods of employment interspersed with periods where he was laid off. Viewing these pay records, and considering the nature of the Claimant's work for the Employer, which was for sporadic periods of time, it is clear that the Claimant could not have actually earned wages 260 days of the year.[14]

The Claimant argues that the daily $77.50 per diem he received from the Employer should be included in the calculation of the average weekly wage. The Claimant cites the Board's holding in *Quinones v. H.B. Zachry Inc.*, 32 BRBS 6 (1998), that the value of room and board provided by the employer is properly included in the calculation of the average weekly wage. Unfortunately for the Claimant, after the District Court refused the Employer's petition for review in this case, the Fifth Circuit Court of Appeals reversed the Board's decision and found that the value of meals and

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13 Where Section 10(a) is inapplicable, application of Section 10(b) must be explored before resorting to application of Section10(c). *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" (within the meaning of Section 10(a)), prior to his injury. 33 U.S.C. §§ 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir.1991); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 136 (1990); *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153 (1979). As there is no evidence in the record of the wages of an employee of the same class who worked substantially the whole year preceding the injury in the same or similar employment, Section 10(b) is also inapplicable.

14 I note that the parties appear to agree that the Claimant's average weekly wage is properly calculated under Section 10(c).

lodging that is exempted from federal income taxation is not properly included in "wages" under the LHWCA. *H. B. Zachry Co. v. Quinones*, 2000 WL 263430 (5TH Cir. March 8, 2000).[15] In doing so, the Fifth Circuit joined the Ninth Circuit, which has also found that the term "wages" in the LHWCA does not include either the value of meals and lodging provided by the Employer, or tax exempt per diem provided by the Employer for the purpose of defraying expenses for food and lodging. *See, McNutt v. BRB*, 140 F.3d 1247 (9th Cir. 1998); *Wausau Ins. Cos. v. Director, OWCP*, 114 F.3d 120 (9th Cir. 1997). As the Court in *Quinones* found,

> Section 902(13) is clear on its face. It provides that "wages" equals monetary compensation plus taxable advantages. We join the Ninth Circuit in holding that § 902(13), on its face, excludes from the definition of "wages" the value of § 119 Meals and Lodging.

Id. at 4. I find that the value of the per diem payments by the Employer is not properly included in the calculation of the Claimant's average weekly wage.

The Employer has provided pay records for 31 of the 33 1/3 weeks worked by the Claimant in the year preceding his injury. Using those pay records, I have listed the Claimant's total pay, by week, broken down into regular and overtime earnings, on the chart which is appended as Attachment A. I note that for 4 of these 31 weeks, the records provided by the Employer appear to have been carelessly copied, as the total earnings do not appear on the copies. Using the information that does appear on the records for those 4 weeks, with the records for the other 27 weeks as a guide, I have made a reasoned approximation of

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[15] The claim in this case was brought under the LHWCA, as modified by the Defense Base Act.

the Claimant's gross pay for those 4 weeks. In addition, Employer's Exhibit 1 indicates that the Claimant worked 5 days the week of November 5, 1997, and 6 days the week of November 12, 1997, but no records were provided for these weeks. The Claimant's list of weekly pay suggests that he worked 6 days the week of November 5, 1997. I note that if a sixth day (10 hours of overtime) were added to this week, the total wages as reflected on the chart match the Claimant's W-2 for 1997. Thus, again using the other payroll records as a guide, and crediting the Claimant with 6 days of work for the weeks of November 5 and November 12, 1997, I have made a reasoned approximation of the Claimant's gross pay for those two weeks. Finally, the Claimant worked on August 20 and 21, for a total of ten hours a day; my chart credits the Claimant with 8 hours of regular pay, and 2 hours of overtime pay for each day. The total income for the year preceding the Claimant's injury is thus $19,611.00. Dividing this figure by 52 provides an average weekly wage of $377.13.

Whether the Claimant's Requested Surgery Should Be Approved

An employer found liable for the payment of compensation is, pursuant to section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Pernell v. Capitol Hill Masonry*, 11 B.R.B.S. 532 (1979); *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984); 20 C.F.R. §702.402. The Administrative Law Judge has the authority to order future medical treatment for a work-related injury. *Caudill v. Sea Tac Alaska Shipbuilding and*

Insurance Company of North America, 25 B.R.B.S. 92 (1991); *McCurley v. Kiewest Co.*, 22 B.R.B.S. 115 (1989).

The Claimant argues that he is entitled to have surgery as recommended by his treating physician, Dr. Perry of the Bonati Institute.[16] The Employer has refused to authorize this surgical procedure, based on the opinions of Dr. Goldberger and Dr. Castellvi.

A careful review of the medical reports from the Bonati Institute shows that in fact, Dr. Perry has never recommended surgery. It appears that Dr. Perry, who is an internist, functions as a gatekeeper at the Bonati Institute, and refers patients to the orthopedic specialists associated with the Institute when necessary. Thus, Dr. Mork evaluated the Claimant upon the referral of Dr. Perry; he examined the Claimant on April 15, 1999, and reviewed the most recent MRI in the exhibit record, which was performed on March 23, 1999. On the basis of his one-time examination of the Claimant, and his review of his records and test results, Dr. Mork recommended lumbar foramenoplasty and arthroscopic laser arthrodesis.[17] There is nothing further from Dr. Mork which describes these procedures, or indicates the expected benefits to the Claimant from the surgery.

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[16] In fact, in his post hearing brief, the Claimant relies strongly on what he characterizes as a recommendation or opinion by his treating physician, Dr. Perry, arguing that Dr. Perry's recommendation, as the treating physician, should be given substantial, if not controlling weight.

[17] Neither Dr. Mork, nor any other physician for that matter, has not explained exactly what "laser arthrodesis" is. The American Medical Association Encyclopedia of Medicine defines "arthrodesis" as "a surgical procedure in which the two bones in a diseased joint are fused to prevent the joint from moving." Dr. Castellvi, who had never heard of the procedure, pointed out that it is difficult to conceive how bones can be fused with a laser.

Dr. Goldberger, on the other hand, saw the Claimant on two occasions; he also reviewed the Claimant's records and test results, including the March 23, 1999 MRI. Dr. Goldberger's interpretation of the MRI was similar to Dr. Mork's, but he specifically noted that the bulging disc and possible minor herniation were not clinically significant. Dr. Goldberger felt that surgery was not indicated, although he approved a discogram to confirm this, and suggested that the Claimant might need a second opinion. There is no indication in the record that the Claimant ever underwent the discogram.

Dr. Castellvi subsequently examined the Claimant in November 1999, and reviewed his records and test results, including the March 23, 1999 MRI. Dr. Castellvi's interpretation of the MRI was essentially the same as Dr. Mork's - that is, that it did not show clinically significant bulging discs. Given the Claimant's essentially normal physical examination, he was fairly emphatic in his opinion that surgery was not necessary.

None of these three specialists appear to have the status of treating physician. Thus, although Dr. Mork is associated with the Bonati Institute, where the Claimant received treatment for his back problems, the records indicate that he saw the Claimant upon referral by Dr. Perry, and provided an evaluation; but he did not treat the Claimant. This was Dr. Perry's role. Similarly, both Dr. Goldberger and Dr. Castellvi saw the Claimant at the request of the Employer, not for the purposes of treatment, but to provide an evaluation. Thus, all of the physicians stand on an equal footing with respect to their relationship with the Claimant. In fact, the Claimant's treating physician, Dr. Perry, who is an internist, has offered no opinions on the necessity for surgery, but has merely recorded the recommendations of Dr. Mork and earlier, Dr. Turner.

Dr. Castellvi is the physician who has examined the Claimant most recently. He reported that the Claimant's physical examination was essentially normal, with no indications of radiculopathy or peripheral nerve injuries. Based on these findings, as well as a review of the most recent MRI on March 23, 1999, Dr. Castellvi concluded that the Claimant has minor degenerative disc disease. He did not feel that the Claimant was a surgical candidate.

I note at the outset that I have the authority under the Act to order the Employer to provide a specific medical procedure. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991). However, before I may do so, I must find that the requested procedure is both reasonable and necessary for the Claimant's work-related injury. *Id.* at 99. There is no dispute that the Claimant's back injury was work-related and is compensable under the Act. However, the Employer disputes whether the surgery recommended by Dr. Mork is reasonable and necessary treatment for this work-related injury. In this regard, the Benefits Review Board has previously held that a claimant establishes a prima facie case of compensable medical treatment where a qualified medical provider indicates that the treatment was necessary for a work-related injury. *Turner v. The Chesapeake and Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984).

In this case, although the Claimant characterizes the recommendation for surgery as coming from his "treating physician," the medical records are totally devoid of a recommendation of any sort from Dr. Perry, the Claimant's treating physician at the Bonati Institute. Dr. Perry, who is an internist, refers briefly in his office notes to the fact that Dr. Mork recommended surgery, but he offers no recommendation or opinion on the necessity for the surgery.[18] The office notes of Dr. Mork (which are the only

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[18] Indeed, as Dr. Perry is neither an orthopaedic surgeon nor a neurologist, his opinion on this issue, even if it were offered, would not be particularly useful.

evidence in the record from Dr. Mork) are brief, to say the least, and offer no explanation of the necessity for the surgery, the expected benefits, or even a description of "laser arthrodesis," a procedure that Dr. Castellvi, also an orthopaedic surgeon, had not heard of.

In contrast, both Dr. Goldberger and Dr. Castellvi reviewed all of the Claimant's medical records, including the most recent high contrast MRI, and explained in detail their findings, concluding that the Claimant was not a candidate for surgery.

I also note that neither Dr. Mork, nor Dr. Turner, who was originally scheduled to perform surgery, discussed any connection between the Claimant's work injury and the need for surgery. Thus, while the MRI's indicate that the Claimant has degenerative disk problems, as well as a clinically insignificant bulging disc, neither Dr. Mork nor Dr. Turner offered any information that would illuminate the issue of whether the proposed surgery was necessary to correct the degenerative problems, the bulging disc, or both, or whether the degenerative problems were the result of the age process, or the work injury.

I find that the brief office notes of Dr. Mork, which date back to April 1999, are insufficient to establish that the proposed surgery is a reasonable procedure necessary to treat the Claimant's work related injury. Thus, the Claimant has not established a prima facie case as to the compensability of the proposed back surgery.

However, even if the Claimant had established a prima facie case of compensability for the proposed back surgery, I also find that the Employer has presented sufficient evidence in rebuttal of compensability. Thus, it is once again the Claimant's burden to persuade the trier-of-fact, by a preponderance of the evidence, that the proposed medical treatment is indeed reasonable and necessary. *See Director, OWCP v. Greenwich Collieries*, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994).

The Employer has presented the medical opinions of Dr. Castellvi and Dr. Goldberger, both of whom have concluded that surgery is not necessary for the treatment of the Claimant's work injury. Against these well-reasoned and documented opinions is balanced the brief and cryptic office notes from Dr. Mork, which date back to April 1999. For whatever reason, Dr. Mork has not provided anything else in the way of a written opinion, or testimony, by deposition or otherwise, that might elucidate the bald conclusions reflected in his office notes. Those notes simply provide no explanation or rationale for the proposed surgery, or discussion of the expected benefits.

In weighing the conflicting medical opinions, I have given more weight to those of Dr. Goldberger and Dr. Castellvi. I find that the Claimant has failed to carry his burden of showing, by a preponderance of the evidence, that the surgery proposed by Dr. Mork is either reasonable or necessary for treatment of his work related injury.[19]

Employer's Entitlement to Section 8(f) Relief

The Director has argued that medical evidence offered by the Employer should not be admitted, as the time for submission of such evidence has passed. The regulations relating to the filing of applications for Section 8(f) relief are found at 20 CFR §702.321. Section (a) of 20 CFR §702.321 requires that the Employer file a "fully documented application" which includes a specific description of the alleged preexisting permanent partial disability, the reasons supporting the contention that the current injury would not have been as severe were it not for

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[19] This is not to say that the Claimant would not be entitled to undergo surgery at the expense of the Employer in the future, if that surgery was reasonable and necessary to treat his work-related injury. At this point, however, he has not met that burden.

the preexisting permanent partial disability and medical evidence supporting the contention, the basis for asserting that the preexisting permanent partial disability was manifest to the Employer, and the documentary medical evidence upon which the Employer is relying. The Employer must provide a current medical report detailing the extent of the Claimant's disability and the date of maximum medical improvement. The medical report must also explain in the case of a total disability, why the current disability is not due solely to the second injury, and in the case of a partial disability, why the current disability is not due solely to the second injury and is materially and substantially greater than it would have been absent the preexisting permanent partial disability. According to section (b) of 20 CRF §702.31, the application should be submitted "when the permanency of the claimant's condition becomes known or is an issue in dispute." The documentation can be submitted after the application, at a time fixed by the Director. However, "[n]either the date selected for submission of the fully documented application nor any extension therefrom can go beyond the date the case is referred to the OALJ for formal hearing." Further, "failure to submit a fully documented application by the date established by the district director shall be an absolute defense to the liability of the special fund."

However, while an application for Section 8(f) relief must be fully documented, there does not appear to be a bar to submission of additional evidence on that issue when the matter is referred to the Office of Administrative Law Judges, as long as the nature of the disabilities in question

does not change.[20] Thus, in deciding the issue of Section 8(f) relief, I will consider all of the evidence of record, including that submitted while this matter was before the Office of Administrative Law Judges.

Under Section 8(f) of the Act, an employer may limit its liability for payment of permanent disability to 104 weeks compensation if three elements are present:

1. The injured worker had an existing permanent partial disability before the most recent injury;
2. The injured worker's existing permanent partial disability was manifest to the employer before the most recent injury; and
3. Depending on whether the permanent disability is total or partial,
   (a) if the present permanent disability is total, it is not due solely to the most recent injury; or
   (b) if the present permanent disability is partial, it is materially and substantially greater than that which would

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[20] In *Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.*, the Fourth Circuit determined that an Employer who requests 8(f) relief for a specific preexisting permanent partial disability within the prescribed time period, may not, after the case is referred for hearing before an ALJ, request 8(f) relief based on a different alleged preexisting permanent partial disability. 134 F.3d 1241 (4th Cir. 1998).

> have resulted from the most recent injury alone without the contribution of the preexisting permanent partial disability.

33 U.S.C. § 908 (f); *Lockheed Shipbuilding v. Director*, OWCP, 25 BRBS 85, 87 (CRT) (9th Cir. 1991). The record is devoid of any evidence whatsoever that the Claimant had a preexisting permanent partial disability at the time of his on-the-job injury. While the testimony of the Claimant does indicate that he was involved in the crash of a Beechcraft aircraft and in a car accident, he also testified that neither of these incidents resulted in any permanent harm to him. Moreover, no medical evidence has been provided to indicate that these incidents caused the Claimant harm. Finally, no medical evidence exists to indicate that the Claimant had any other type of physical ailment which might have rendered him permanently partially disabled prior to his injury of 1998.[21] Accordingly, I find that the Employer is not entitled to relief under Section 8(f) of the Act.

ORDER

On the basis of the foregoing, Employer shall:

(1) Pay the Claimant compensation benefits for total temporary disability from August 21, 1998, and continuing, based on an average weekly wage of $377.13.

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[21] Moreover, as discussed earlier, there is no evidence in the record from which I can find that the Claimant has reached maximum medical improvement.

(2) The Employer shall take credit for all previous compensation payments made to the Claimant against the payments ordered in (1) above.

(3) Pay to the Claimant all medical benefits to which he is entitled as a result of his injury under Section 7 of the Act. However, the Employer is not required to pay for surgery as proposed by Dr. Mork.

(4) Pay to the Claimant's attorney fees and costs to be established by a supplemental order.

SO ORDERED.

/s/_____

LINDA S. CHAPMAN

Administrative Law Judge

ATTACHMENT A: AVERAGE WEEKLY WAGE CALCULATION

DATE	REGULAR	OVERTIME	TOTAL PAY	NOTES
8/27/97	$360	$270	$630.00	EX1 - 6 days worked, pay approximated since earnings record not completely copied.
9/03/97	$360	$310.50	$670.50	
9/10/97	$360	$405	$765.00	EX1 - 7 days worked, pay approximated since earnings record not completely copied
9/17/97	$144	$54	$198.00	
9/23/97	$288	$108	$396.00	
10/1/97	$360	$270	$630.00	EX1 - 6 days worked, pay approximated since earnings record not completely copied
10/8/97	$360	$270	$630.00	
10/15/97	$360	$270	$630.00	
10/22/97	$360	$270	$630.00	
10/29/97	$360	$270	$630.00	

11/5/97	$360	$270	$630.00	CX 8 - gross pay less per diem suggests 6 days of work, though EX 1 says only 5 days
11/12/97	$360	$270	$630.00	EX1- 6 days worked. no payroll records for this week, pay approximated
11/19/97	$432	$162	$594.00	
11/26/97	$360	$270	$630.00	EX1 - 6 days worked, pay approximated since earnings record not completely copied
12/3/97	$360	$270	$630.00	
12/10/97	$360	$405	$765.00	
12/17/97	$360	$324	$684.00	
12/23/97	$288	$108	$396.00	
1/7/98	$72	$27	$99.00	
1/14/98	$360	$270	$630.00	
1/21/98	$360	$270	$630.00	
1/28/98	$360	$270	$630.00	
2/4/98	$360	$202.50	$562.50	
2/11/98	$360	$270	$630.00	
2/18/98	$360	$270	$630.00	

2/25/98	$360	$270	$630.00	
3/4/98	$360	$270	$630.00	
3/10/98	$360	$270	$630.00	
3/18/98	$72	$27	$99.00	
7/29/98	$360	$594	$954.00	
8/5/98	$360	$270	$630.00	
8/12/98	$360	$270	$630.00	
8/19/98	$360	$270	$630.00	
8/20/98	$72	$27	$99.00	EX1 total pay for week indicates 10 hour days, so one day with 8 hr regular, 2 hr overtime
8/21/98	$72	$27	$99.00	EX1 total pay for week indicates 10 hour days, so one day with 8 hr regular, 2 hr overtime

$19,611.0	**TOTAL INCOME FOR YEAR PRECEDING INJURY**
$377.13	**AVERAGE WEEKLY WAGE**